No. 95-244

(5)

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, HOLLAND-AMERICA INSURANCE COMPANY TRUST AND MISSION REINSURANCE CORPORATION TRUST,
Petitioner,

v.

ALLSTATE INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 11, 1995
CERTIORARI GRANTED OCTOBER 16, 1995

BEST AVAILABLE COPY

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Note:

The following documents do not appear in this Joint Appendix because they were reproduced in the Appendix to the Petition for Certiorari:

Opinion of the United States Court of Appeals for the Ninth Circuit, dated February 2, 1995 (Appendix A) 2a

Order of the United States District Court, Central District of California, dated July 1, 1991 (Appendix B) 13a

Order of the United States Court of Appeals for the Ninth Circuit, dated May 19, 1995 (Appendix C) 35a

15 U.S.C. §§ 1011-1015 (Appendix D) 38a

California Insurance Code §§ 900-900.2, 900.9, 903-903.5, 905-911, 922.1-923.5, 925, 925.2, 925.4, 1010-1042, 1056.5-1064.12 (Appendix D) 39a

28 U.S.C. §§ 1332(a), 1441(a), (c) (Appendix D) 115a

Order of the Superior Court of the State of California for the County of Los Angeles, Appointing Conservator and Restraining Order in Case No. C572724, dated October 31, 1985 (Appendix E) 116a

Order of the Superior Court of the State of California for the County of Los Angeles Appointing Liquidator and Restraining Order in Case No. C572724 dated February 24, 1987 (Appendix E) 119a

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Excerpts of Respondent Allstate's Opening and Reply Briefs in the United States Court of Appeals for the Ninth Circuit (Appendix F) 127a

The following documents do not appear in this Joint Appendix because they were reproduced in the Appendix to the Brief in Opposition to Petition for Writ of Certiorari:

Order of the United States Court of Appeals for the Ninth Circuit, dated February 14, 1992 (Appendix 1) 1a

28 U.S.C. § 1447 (Appendix 2) 3a

9 U.S.C. §§ 1-16 (Appendix 2) 4a

SUPERIOR COURT
FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Case No. C 751868

QUACKENBUSH

v.

ALLSTATE INSURANCE COMPANY

RELEVANT DOCKET ENTRIES

Date	Proceedings
1990	
2/9/90	COMPLAINT filed and summons issued.
2/13/90	NOTICE OF RELATED CASES filed.
3/1/90	COURT finds that C751868 is related to C572724 and is assigned to Division 67.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV90-4713WMB

QUACKENBUSH

v.

ALLSTATE INSURANCE COMPANY,

RELEVANT DOCKET ENTRIES

Date	Proceedings
1990	
8/31/90	NOTICE by defendant of removal from Los Angeles County Superior Court with copy of Summons & Complaint, NOTICE by defendant of related cases & 1st set of interrogatories.
9/10/90	DECLARATION by defendant of David Brodnan in support of motion. MEMORANDUM OF POINTS AND AUTHORITIES by defendant in support of motion. MOTION by defendant to compel arbitration.
9/13/90	MINUTE ORDER re: plaintiff's motion to remand is to be filed by 9/24/90 with the opposition due by 10/1/90 and reply due 10/5/90, motion will be heard on 10/16/90 at 10 am; if the motion to remand is denied, a hearing date on the motion to compel arbitration will be set at that time.
9/25/90	MOTION by plaintiff to remand.

Date	Proceedings
1990	
	DECLARATION by plaintiff of Kooistra in support of motion to remand. REQUEST by plaintiff for judicial notice in support of motion to remand. MEMORANDUM OF POINTS AND AUTHORITIES by plaintiff in support of motion to remand.
10/9/90	MEMORANDUM OF POINTS AND AUTHORITIES by defendant in opposition to motion to remand. DECLARATION by defendant of David Brodnan in opposition to motion to remand. REQUEST by defendant for judicial notice in opposition to motion to remand.
10/30/90	REPLY by plaintiff to defendant's opposition to motion to remand. 2ND REQUEST by plaintiff for judicial notice in support of motion to remand.
1991	
2/8/91	STIPULATION by defendants to plaintiff's dismissal of certain named defendants. SUPPLEMENTAL NOTICE OF REMOVAL of action and statement of additional ground for removal and jurisdiction by defendants.
2/15/91	SUPPLEMENTAL BRIEF by plaintiff in support of motion to remand and opposition to defendant's supplemental notice of removal of civil action and statement of additional grounds for removal and jurisdiction.
3/22/91	SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES by plaintiff in support of motion to remand.

Date	Proceedings
1991	
	APPENDIX OF NON-CALIFORNIA AUTHORITIES by plaintiff in support of supplemental memorandum of points and authorities in support of motion to remand.
	SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES by defendant Allstate re: Commissioner's motion to remand.
4/5/91	BRIEF by plaintiff in reply to Allstate's supplemental memorandum of points and authorities.
	SUPPLEMENTAL REPLY MEMORANDUM OF POINTS AND AUTHORITIES by defendant Allstate respecting Commissioner's motion to remand.
4/10/91	APPENDIX OF NON-CALIFORNIA AUTHORITIES by plaintiff in support of Insurance Commissioner's brief in reply to Allstate supplemental memorandum of points and authorities.
4/18/91	MINUTE ORDER by the Court ruling that the motion to remand is granted. However, the Court takes the matter under submission and a written order will be filed and mailed to counsel.
7/1/91	ORDER by court holding that Burford abstention is appropriate here, the Commissioner's motion to remand this action to state court is granted.
7/17/91	NOTICE OF APPEAL TO 9TH CIRCUIT filed by defendant from order filed 7/1/91. Filing and document fee billed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 91-55855

QUACKENBUSH

v.

ALLSTATE INSURANCE COMPANY

RELEVANT DOCKET ENTRIES

Date	Proceedings
1991	
8/7/91	DOCKETED cause and entered appearances of counsel.
10/15/91	CERTIFICATE OF RECORD on appeal filed in District Court 10/3/91.
11/6/91	MOTION by Appellant in 91-55855 to consolidate cases 91-55855 and 91-55907.
	ORDER by Deputy Clerk that Appellants' motion to consolidate cases is granted.
11/7/91	OPENING BRIEF by Appellant in 91-55855; filed original and 15 copies, 40 pages and five excerpts of record in 1 volume served on 11/4/91.
1992	
1/7/92	BRIEF by Appellee in 91-55855 and 91-55907; filed original and 15 copies, 36 pages brief, 5 supplemental excerpts in 1 volume served on 1/3/92.

Date	Proceedings
1992	
1/7/92	MOTION by Appellee to dismiss the appeal; exhibits.
1/22/92	BRIEF by Appellants in opposition to Appellee's motion to dismiss appeal.
2/3/92	REPLY of Appellee in reply to Appellants' opposition to motion to dismiss.
2/14/92	ORDER by William A. Norris, Edward Leavy; Appellants' motion for an extension of time within which to file opposition to appellee's motion to dismiss the appeal is granted. The opposition shall be filed as of January 22, 1992, the date it was received. This appeal arises from an order remanding on abstention grounds. Because the remand order was not based on jurisdictional grounds, the prohibition on appellate review imposed by 28 U.S.C. 1447(d) does not apply. See *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-52. Accordingly, the motion to dismiss is denied. However, because it is not clear whether this appeal should be more properly treated as a petition for writ of mandamus, we refer the papers filed in connection with the motion to dismiss for lack of jurisdiction to the merits panel for such consideration as it deems appropriate. Appellants' opening brief and Appellee's answering brief has been filed. The due date for the reply brief set out in this court's November 6, 1991 order is vacated. The reply brief shall be due 14 days from the date of this order. This appeal is ready for calendaring.
3/20/92	REPLY BRIEF by Appellants; 16 pages.
8/27/92	ORDER by Deputy Clerk. Consolidated appeal no. 91-55907 is dismissed voluntarily with prejudice pursuant to the parties' stipulation.
1993	
9/1/93	CALENDARED: Pasadena November 5, 1993, 9:00 a.m.

Date	Proceedings
1993	
11/5/93	ARGUED AND SUBMITTED to Betty B. Fletcher, Harry Pregerson, William A. Norris.
1995	
2/2/95	OPINION filed by court: the District Court's remand order is vacated and the case is remanded for proceedings consistent with this opinion.
2/16/95	PETITION by Appellee for rehearing with suggestion for rehearing en banc; 15 pages, filed original and 40 copies.
2/27/95	ORDER by Betty B. Fletcher, Harry Pregerson, William A. Norris. Appellant is directed to file a response to Appellee's petition for rehearing and suggestion for rehearing en banc filed with this court on 2/16/95. The response shall not exceed 15 pages and shall be filed within 21 days of the date of this order.
3/21/95	RESPONSE by Appellant to petition for rehearing and suggestion for rehearing en banc.
5/19/95	ORDER by Betty B. Fletcher, Harry Pregerson, William A. Norris. The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.
5/31/95	MANDATE ISSUED.
8/17/95	NOTICE from Supreme Court: petition for certiorari filed Supreme Court No. 95-244 filed on 8/11/95.
10/20/95	NOTICE from Supreme Court: petition for certiorari granted on 10/16/95.

[Filed Nov. 26, 1985]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576323

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

HOLLAND-AMERICA INSURANCE COMPANY,
a Missouri corporation,
Respondent.

ORDER APPOINTING CONSERVATOR AND RESTRAINING ORDER

The verified Application of the Insurance Commissioner of the State of California having been filed herein and it appearing to this court from said Application that said Commissioner has found Holland-America Insurance Company to be in such a condition that its further transaction of business will be hazardous to its policyholders, creditors, and the public,

IT IS HEREBY ORDERED:

1. That the Insurance Commissioner of the State of California, Applicant herein, is hereby appointed Conservator of Holland-America Insurance Company, Respondent herein, and directed as such to conduct the business of Respondent or so much thereof as to said Conservator may seem appropriate; and said Conservator is authorized, in his discretion, to pay or defer payment of all claims and obligations against Respondent accruing prior to or subsequent to Applicant's appointment as Conservator;

2. That said Conservator forthwith take possession of all Respondent's assets, books, records and property, both real and personal, wheresoever situated;

3. That there is hereby vested in said Conservator and his successors in office, title to all of the property and assets of said Respondent, wheresoever situated, and all persons are hereby enjoined from interfering in any manner with the said Conservator's possession and title thereto;

4. That said Respondent, its officers, directors, governors, agents and employees are hereby enjoined from transacting any of the business of Respondent, or from disposing of any of its property or assets until further order of this court;

5. That all persons are hereby enjoined from maintaining or instituting any action at law or suit in equity, including but not limited to matters in arbitration, against said Respondent or against the said Conservator, and from attaching or executing upon or taking any legal proceeding against any of the property of Respondent, and from doing any act interfering with the conduct of said business by the Conservator, except after an order from this court obtained after reasonable notice to the Conservator;

6. That all officers, directors, agents and employees of Respondent deliver to the Conservator all assets, books, records, equipment and other property of Respondent, wheresoever situated;

7. That the Conservator is authorized to pay all reasonable costs of operating Respondent as Conservator out of the funds and assets of said Respondent;

8. That all funds including certificates of deposit and bank accounts in the name of Respondent in various banks in the State of California, and in other banks wheresoever situated, are hereby vested in the Conservator and subject to withdrawal upon his order only;

9. That all agents of Respondent and all brokers who have written business for Respondent make remittances of funds collected by them or in their hands to the Applicant as Conservator;

10. That all persons having possession of any lists of policyholders of Respondent deliver all such lists to Applicant as Conservator; that all persons are enjoined from using such lists or any information contained therein without the consent of said Conservator;

11. That the Conservator is authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his functions as Conservator;

12. That the Conservator is authorized to pay for his costs in bringing and maintaining this action, and such other actions as are necessary to carry out his functions as Conservator.

DATED: Nov. 26, 1985

/s/ John L. Cole
Judge of the Superior Court

[Filed Nov. 26, 1985]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576324

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION NATIONAL INSURANCE COMPANY,
a California corporation,
Respondent.

ORDER APPOINTING CONSERVATOR AND RESTRAINING ORDER

The verified Application of the Insurance Commissioner of the State of California having been filed herein and it appearing to this court from said Application that said Commissioner has found Mission National Insurance Company to be in such a condition that its further transaction of business will be hazardous to its policyholders, creditors, and the public.

IT IS HEREBY ORDERED:

1. That the Insurance Commissioner of the State of California, Applicant herein, is hereby appointed Conservator of Mission National Insurance Company, Respondent herein, and directed as such to conduct the business of Respondent or so much thereof as to said Conservator may seem appropriate; and said Conservator is authorized, in his discretion, to pay or defer payment of all claims and obligations against Respondent accruing

prior to or subsequent to Applicant's appointment as Conservator;

2. That said Conservator forthwith take possession of all Respondent's assets, books, records and property, both real and peronal, wheresoever situated;

3. That there is hereby vested in said Conservator and his successors in office, title to all of the property and assets of said Respondent, wheresoever situated and all persons are hereby enjoined from interfering in any manner with the said Conservator's possession and title thereto;

4. That said Respondent, its officers, directors, governors, agents and employees are hereby enjoined from transacting any of the business of Respondent, or from disposing of any of its property or assets until further order of this court;

5. That all persons are hereby enjoined from maintaining or instituting any action at law or suit in equity, including but not limited to matters in arbitration, against said Respondent or against the said Conservator, and from attaching or executing upon or taking any legal proceeding against any of the property of Respondent, and from doing any act interfering with the conduct of said business by the Conservator, except after an order from this court obtained after reasonable notice to the Conservator;

6. That all officers, directors, agents and employees of Respondent deliver to the Conservator all assets, books, records, equipment and other property of Respondent wheresoever situated;

7. That the Conservator is authorized to pay all reasonable costs of operating Respondent as Conservator out of the funds and assets of said Respondent;

8. That all funds including certificates of deposit and bank accounts in the name of Respondent in various

banks in the State of California, and in other banks wheresoever situated, are hereby vested in the Conservator and subject to withdrawal upon his order only;

9. That all agents of Respondent and all brokers who have written business for Respondent make remittances of funds collected by them or in their hands to the Applicant as Conservator;

10. That all persons having possession of any lists of policyholders of Respondent deliver all such lists to Applicant as Conservator; that all persons are enjoined from using such lists or any information contained therein without the consent of said Conservator;

11. That the Conservator is authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his functions as Conservator;

12. That the Conservator is authorized to pay for his costs in bringing and maintaining this action, and such other actions as are necessary to carry out his functions as Conservator.

DATED: Nov. 26, 1985

/s/ John L. Cole
Judge of the Superior Court

[Filed Nov. 26, 1985]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576325

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

ENTERPRISE INSURANCE COMPANY,
a California corporation,
Respondent.

ORDER APPOINTING CONSERVATOR AND RESTRAINING ORDER

The verified Application of the Insurance Commisioner of the State of California having been filed herein and it appearing to this court from said Application that said Commissioner has found Enterprise Insurance Company to be in such a condition that its further transaction of business will be hazardous to its policyholders, creditors, and the public;

IT IS HEREBY ORDERED:

1. That the Insurance Commissioner of the State of California, Applicant herein, is hereby appointed Conservator of Enterprise Insurance Company, Respondent herein, and directed as such to conduct the business of Respondent or so much thereof as to said Conservator may seem appropriate; and said Conservator is authorized, in his discretion, to pay or defer payment of all claims and obligations against Respondent accruing prior to or subsequent to Applicant's appointment as Conservator;

2. That said Conservator forthwith take possession of all Respondent's assets, books, records and property, both real and personal, wheresoever situated;

3. That there is hereby vested in said Conservator and his successors in office, title to all of the property and assets of said Respondent, wheresoever situated and all persons are hereby enjoined from interfering in any manner with the said Conservator's possession and title thereto;

4. That said Respondent, its officers, directors, governors, agents and employees are hereby enjoined from transacting any of the business of Respondent, or from disposing of any of its property or assets until further order of this court;

5. That all persons are hereby enjoined from maintaining or instituting any action at law or suit in equity, including but not limited to matters in arbitration, against said Respondent or against the said Conservator, and from attaching or executing upon or taking any legal proceeding against any of the property of Respondent, and from doing any act interfering with the conduct of said busines by the Conservator, except after an order from this court obtained after reasonable notice to the Conservator;

6. That all officers, directors, agents and employees of Respondent deliver to the Conservator all assets, books, records, equipment and other property of Respondent wheresoever situated;

7. That the Conservator is authorized to pay all reasonable costs of operating Respondent as Conservator out of the funds and assets of said Respondent;

8. That all funds including certificates of deposit and bank accounts in the name of Respondent in various banks in the State of California, and in other banks wheresoever situated, are hereby vested in the Conservator and subject to withdrawal upon his order only;

9. That all agents of Respondent and all brokers who have written business for Respondent make remittances of funds collected by them or in their hands to the Applicant as Conservator;

10. That all persons having possession of any lists of policyholders of Respondent deliver all such lists to Applicant as Conservator; that all persons are enjoined from using such lists or any information contained therein without the consent of said Conservator;

11. That the Conservator is authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his functions as Conservator;

12. That the Conservator is authorized to pay for his costs in bringing and maintaining this action, and such other actions as are necessary to carry out his functions as Conservator.

DATED: Nov. 26, 1985

/s/ John L. Cole
JOHN L. COLE
Judge of the Superior Court

[Filed Nov. 26, 1985]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576416

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,
v.
MISSION REINSURANCE CORPORATION,
a California corporation,
Respondent.

ORDER APPOINTING CONSERVATOR AND RESTRAINING ORDER

The verified Application of the Insurance Commissioner of the State of California having been filed herein and it appearing to this court from said Application that said Commissioner has found Mission Reinsurance Corporation to be in such a condition that its further transaction of business will be hazardous to its policyholders, creditors, and the public,

IT IS HEREBY ORDERED:

1. That the Insurance Commissioner of the State of California, Applicant herein, is hereby appointed Conservator of Mission Reinsurance Corporation, Respondent herein, and directed as such to conduct the business of Respondent or so much thereof as to said Conservator may seem appropriate; and said Conservator is authorized, in his discretion, to pay or defer payment of all claims and obligations against Respondent accruing prior to or subsequent to Applicant's appointment as Conservator;

2. That said Conservator forthwith take possession of all Respondent's assets, books, records and property, both real and personal, wheresoever situated;

3. That there is hereby vested in said Conservator and his successors in office, title to all of the property and assets of said Respondent, wheresoever situated and all persons are hereby enjoined from interfering in any manner with the said Conservator's possession and title thereto;

4. That said Respondent, its officers, directors, governors, agents and employees are hereby enjoined from transacting any of the business of Respondent, or from disposing of any of its property or assets until further order of this court;

5. That all persons are hereby enjoined from maintaining or instituting any action at law or suit in equity, including but not limited to matters in arbitraton, against said Respondent or against the said Conservator, and from attaching or executing upon or taking any legal proceeding against any of the property of Respondent, and from doing any act interfering with the conduct of said business by the Conservator, except after an order from this court obtained after reasonable notice to the Conservator;

6. That all officers, directors, agents and employees of Respondent deliver to the Conservator all assets, books, records, equipment and other property of Respondent, wheresoever situated;

7. That the Conservator is authorized to pay all reasonable costs of operating Respondent as Conservator out of the funds and assets of said Respondent;

8. That all funds including Certificates of Deposit and bank accounts in the name of Respondent in various banks in the State of California, and in other banks wheresoever situated, are hereby vested in the Conservator and subject to withdrawal upon his order only;

9. That all agents of Respondent and all brokers who have written business for Respondent make remittances of funds collected by them or in their hands to the Applicant as Conservator;

10. That all persons having possession of any lists of policyholders of Respondent deliver all such lists to Applicant as Conservator; that all persons are enjoined from using such lists or any information contained therein without the consent of said Conservator;

11. That the Conservator is authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his functions as Conservator;

12. That the Conservator is authorized to pay for his costs in bringing and maintaining this action, and such other actions as are necessary to carry out his functions as Conservator.

DATED: Nov. 26, 1985

/s/ John L. Cole
Judge of the Superior Court

[Filed May 2, 1986]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576416

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION REINSURANCE CORPORATION,
a Missouri corporation,
Respondent.

AMENDED ORDER APPOINTING CONSERVATOR AND RESTRAINING ORDER

The verified Application of the Insurance Commissioner of the State of California having been filed herein and it appearing to this court from said Application that said Commissioner has found Mission Reinsurance Corporation to be in such a condition that its further transaction of business will be hazardous to its policyholders, creditors, and the public,

IT IS HEREBY ORDERED:

1. That the Insurance Commissioner of the State of California, Applicant herein, is hereby appointed Conservator of Mission Reinsurance Corporation, Respondent herein, and directed as such to conduct the business of Respondent or so much thereof as to said Conservator may seem appropriate; and said Conservator is authorized, in his discretion, to pay or defer payment of all claims and obligations against Respondent accruing prior to or subsequent to Applicant's appointment as Conservator;

2. That said Conservator forthwith take possession of all Respondent's assets, books, records and property, both real and peronal, wheresoever situated;

3. That there is hereby vested in said Conservator and his successors in office, title to all of the property and assets of said Respondent, wheresoever situated and all persons are hereby enjoined from interfering in any manner with the said Conservator's possession and title thereto;

4. That said Respondent, its officers, directors, governors, agents and employees are hereby enjoined from transacting any of the business of Respondent, or from disposing of any of its property or assets until further order of this court;

5. That all persons are hereby enjoined from maintaining or instituting any action at law or suit in equity, including but not limited to matters in arbitration, against said Respondent or against the said Conservator, and from attaching or executing upon or taking any legal proceeding against any of the property of Respondent, and from doing any act interfering with the conduct of said business by the Conservator, except after an order from this court obtained after reasonable notice to the Conservator;

6. That all officers, directors, agents and employees of Respondent deliver to the Conservator all assets, books, records, equipment and other property of Respondent, wheresoever situated;

7. That the Conservator is authorized to pay all reasonable costs of operating Respondent as Conservator out of the funds and assets of said Respondent;

8. That all funds including Certificates of Deposit and bank accounts in the name of Respondent in various banks in the State of California, and in other banks wheresoever situated, are hereby vested in the Conservator and subject to withdrawal upon his order only;

9. That all agents of Respondent and all brokers who have written business for Respondent make remittances of funds collected by them or in their hands to the Applicant as Conservator;

10. That all persons having possession of any lists of policyholders of Respondent deliver all such lists to Applicant as Conservator; that all persons are enjoined from using such lists or any information contained therein without the consent of said Conservator;

11. That the Conservator is authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his functions as Conservator;

12. That the Conservator is authorized to pay for his costs in bringing and maintaining this action, and such other actions as are necessary to carry out his functions as Conservator.

DATED: May 2, 1986

/s/ Vernon G. Foster
Judge of the Superior Court

[Filed Feb. 24, 1987]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576323

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

HOLLAND-AMERICA INSURANCE COMPANY,
a Missouri corporation,
Respondent.

ORDER APPOINTING LIQUIDATOR AND RESTRAINING ORDER

The verified Application for Order of Liquidation of Respondent, Holland-America Insurance Company came on regularly for hearing on February 24, 1987, in Department 85 at 9:00 a.m., the Honorable Jerry K. Fields, judge presiding. Applicant appeared by his counsel, John K. Van De Kamp, Attorney General of the State of California, by Raymond Jue, Deputy Attorney General, there was an appearance by John Adams.

IT IS ORDERED THAT:

1. The Insurance Commissioner of the State of California is appointed in his official capacity as Liquidator of Respondent, Holland-America Insurance Company and directed to liquidate and wind up the affairs of Respondent in California and to act in all ways and exercise all powers necessary for the purpose of carrying out such order;

2. Title to all assets of Respondent now in the possession of the Insurance Commissioner as Conservator hereof, as well as title to any assets of said Respondent discovered hereafter located in California, is hereby vested in said Liquidator;

3. Said Liquidator, as such, is hereby authorized to pay as expenses of administration, all expenses heretofore incurred by the Conservator of Respondent and presently unpaid and is hereby authorized to pay the full amount of any checks or drafts which have been issued by the Conservator of Respondent and which are presently outstanding and unpaid when said checks or drafts are presented for payment;

4. The rights and liabilities of creditors, policyholders, shareholders, and all other persons interested in the assets of Respondent, including the State of California, be fixed as of the date of entry of this order;

5. Respondent and its officers, directors, agents and employees and all other persons are hereby enjoined and restrained from transacting any of the business of Respondent or the disposition of any of its assets or property;

6. All persons are hereby enjoined and restrained from interfering with the possession, title and rights of Applicant, as Liquidator, in and to the assets of Respondent and from interfering with the conduct of the liquidation in the winding up of the business of Respondent;

7. All persons are hereby enjoined from the waste of assets of Respondent;

8. All persons are hereby enjoined from instituting or prosecuting any action or proceeding against Respondent, or Applicant as Liquidator of Respondent, without the consent of this court obtained after reasonable notice to said Liquidator;

9. All persons are hereby enjoined from obtaining preferences, judgments, attachments or other liens, or

making any levy against Respondent or its assets without the consent of this court obtained after reasonable notice to said Liquidator;

10. All officers, directors, agents and employees of Respondent are hereby ordered to deliver to said Liquidator all assets, books, records, equipment and other property of said Respondent;

11. All funds and bank accounts in the name of Respondent, or Applicant as Conservator, are hereby vested in said Liquidator and said funds shall be subject to withdrawal from said banks upon the order of said Liquidator only;

12. All insurance agents and brokers are hereby ordered to account to the Liquidator of Respondent for all funds of Respondent held by them in their fiduciary capacity, as specified in Sections 1733, 1734 and 1735 of the Insurance Code, or due to Respondent, and directed to forward said funds to Applicant as Liquidator and said funds are vested in Applicant as Liquidator; and

13. Said Liquidator is hereby authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his function as Liquidator.

DATED: February 24, 1987.

/s/ Jerry K. Fields
JERRY K. FIELDS
Judge of the Superior Court

[Filed Feb. 24, 1987]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576324

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION NATIONAL INSURANCE COMPANY,
a California corporation,
Respondent.

ORDER APPOINTING LIQUIDATOR AND RESTRAINING ORDER

The verified Application for Order of Liquidation of Respondent, Mission National Insurance Company came on regularly for hearing on February 24, 1987, in Department 86 at 9:00 a.m., the Honorable Ricardo Torres, judge presiding. Applicant appeared by his counsel, John K. Van De Kamp, Attorney General of the State of California, by Raymond Jue, Deputy Attorney General, there was no other appearance.

IT IS HEREBY ORDERED THAT:

1. The Insurance Commissioner of the State of California is appointed in his official capacity as Liquidator of Respondent, Mission National Insurance Company and directed to liquidate and wind up the affairs of Respondent in California and to act in all ways and exercise all powers necessary for the purpose of carrying out such order;

2. Title to all assets of Respondent now in the possession of the Insurance Commissioner as Conservator hereof, as well as title to any assets of said Respondent discovered hereafter located in California is hereby vested in said Liquidator;

3. Said Liquidator, as such, is hereby authorized to pay as expenses or administration, all expenses heretofore incurred by the Conservator of Respondent and presently unpaid and is hereby authorized to pay the full amount of any checks or drafts which have been issued by the Conservator of Respondent and which are presently outstanding and unpaid when said checks or drafts are presented for payment;

4. The rights and liabilities of creditors, policyholders, shareholders, and all other persons interested in the assets of Respondent, including the State of California, be fixed as of the date of entry of this order;

5. Respondent, its officers, directors, agents and employees and all other persons are hereby enjoined and restrained from transacting any of the business of Respondent or the disposition of any of its assets of property;

6. All persons are hereby enjoined and restrained from interference with the possession, title and rights of Applicant, as Liquidator, in and to the assets of Respondent and from interfering with the conduct of the liquidator in winding up of the busines of Respondent;

7. All persons are hereby enjoined from the waste of assets of Respondent;

8. All persons are hereby enjoined from instituting or prosecuting any action or proceedings against Respondent, or Applicant as Liquidator of Respondent, without the consent of this court obtained after reasonable notice to said Liquidator;

9. All persons are hereby enjoined from obtaining preferences, judgments, attachments or other liens, or making any levy against Respondent or its assets without the consent of this court obtained after reasonable notice to said Liquidator;

10. All officers, directors, agents and employees of Respondent are hereby ordered to deliver to said Liquidator all assets, books, records, equipment and other property of said Respondent;

11. All funds and bank accounts in the name of Respondent, or Applicant as Conservator, are hereby vested in said Liquidator and said funds shall be subject to withdrawal from said banks upon the order of said Liquidator only;

12. All insurance agents and brokers are hereby ordered to account to the Liquidator of Respondent for all funds of Respondent held by them in their fiduciary capacity, as specified in Sections 1733, 1734 and 1735 of the Insurance Code, or due to Respondent, and directed to forward said funds to Applicant as Liquidator, and said funds are vested in Applicant as Liquidator; and

13. Said Liquidator is hereby authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his function as Liquidator.

DATED: February 24, 1987.

/s/ Ricardo Torres
RICARDO TORRES
Judge of the Superior Court

[Filed Feb. 24, 1987]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576325

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

ENTERPRISE INSURANCE COMPANY,
a California corporation,
Respondent.

ORDER APPOINTING LIQUIDATOR AND RESTRAINING ORDER

The verified Application for Order of Liquidation of Respondent, Enterprise Insurance Company came on regularly for hearing on February 24, 1987. in Department 85 at 9:00 a.m., the Honorable Jerry K. Fields, judge presiding. Applicant appeared by his counsel, John K. Van De Camp, Attorney General of the State of California, by Raymond Jue, Deputy Attorney General, there were appearances by John Holmes, Teresa Ferguson, and G. Prose for opposing party.

IT IS ORDERED THAT:

1. The Insurance Commissioner of the State of California is appointed in his official capacity as Liquidator of Respondent, Enterprise Insurance Company and directed to liquidate and wind up the affairs of Respondent in California and to act in all ways and exercise all powers necessary for the purpose of carrying out such order;

2. Title to all assets of Respondent now in the possession of the Insurance Commissioner as Conservator hereof, as well as title to any assets of said Respondent discovered hereafter located in California, is hereby vested in said Liquidator;

3. Said Liquidator, as such, is hereby authorized to pay as expenses of administration, all expenses heretofore incurred by the Conservator of Respondent and presently unpaid and is hereby authorized to pay the full amount of any checks or drafts which have been issued by the Conservator of Respondent and which are presently outstanding and unpaid when said checks or drafts are presented for payment;

4. The rights and liabilities of creditors, policyholders, shareholders, and all other persons interested in the assets of Respondent, including the State of California, be fixed as of the date of entry of this order;

5. Respondent and its officers, directors, agents and employees and all other persons are hereby enjoined and restrained from transacting any of the business of Respondent or the disposition of any of its assets or property;

6. All persons are hereby enjoined and restrained from interfering with the possession, title and rights of Applicant, as Liquidator, in and to the assets of Respondent and from interfering with the conduct of the liquidation in winding up of the business of Respondent;

7. All persons are hereby enjoined from the waste of assets of Respondent;

8. All persons are hereby enjoined from instituting or prosecuting any action or proceedings against Respondent, or Applicant as Liquidator of Respondent, without the consent of this court obtained after reasonable notice to said Liquidator;

9. All persons are hereby enjoined from obtaining preferences, judgments, attachments or other liens, or

making any levy against Respondent or its assets without the consent of this court obtained after reasonable notice to said Liquidator;

10. All officers, directors, agents and employees of Respondent are hereby ordered to deliver to said Liquidator all assets, books, records, equipment and other property of said Respondent;

11. All funds and bank accounts in the name of Respondent, or Applicant as Conservator, are hereby vested in said Liquidator and said funds shall be subject to withdrawal from said banks upon the order of said Liquidator only;

12. All insurance agents and brokers are hereby ordered to account to the Liquidator of Respondent for all funds of Respondent held by them in their fiduciary capacity, as specified in Sections 1733, 1734 and 1735 of the Insurance Code, or due to Respondent, and directed to forward said funds to Applicants as Liquidator and said funds are vested in Applicant as Liquidator; and

13. Said Liquidator is hereby authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his function as Liquidator.

DATED: February 24, 1987.

/s/ Jerry K. Fields
JERRY K. FIELDS
Judge of the Superior Court

[Filed Feb. 24, 1987]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576416

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION REINSURANCE CORPORATION,
a Missouri corporation,
Respondent.

ORDER APPOINTING LIQUIDATOR AND RESTRAINING ORDER

The verified Application for Order of Liquidation of Respondent, Mission Reinsurance Company came on regularly for hearing on February 24, 1987, in Department 86 at 9:00 a.m., the Honorable Ricardo Torres, judge presiding. Applicant appeared by his counsel, John K. Van De Kamp, Attorney General of the State of California, by Raymond Jue, Deputy Attorney General, there was no other appearance.

IT IS HEREBY ORDERED THAT:

1. The Insurance Commissioner of the State of California is appointed in his official capacity as Liquidator of Respondent, Mission Reinsurance Company and directed to liquidate and wind up the affairs of Respondent in California and to act in all ways and exercise all powers necessary for the purpose of carrying out such order;

2. Title to all assets of Respondent now in the possession of the Insurance Commissioner as Conservator hereof, as well as title to any assets of said Respondent discovered hereafter located in California is hereby vested in said Liquidator;

3. Said Liquidator, as such, is hereby authorized to pay as expenses of administration, all expenses heretofore incurred by the Conservator of Respondent and presently unpaid and is hereby authorized to pay the full amount of any checks or drafts which have been issued by the Conservator of Respondent and which are presently outstanding and unpaid when said checks or drafts are presented for payment;

4. The rights and liabilities of creditors, policyholders, shareholders, and all other persons interested in the assets of Respondent, including the State of California, be fixed as of the date of entry of this order;

5. Respondent, its officers, directors, agents and employees and all other persons are hereby enjoined and restrained from transacting any of the business of Respondent or the disposition of any of its assets or property;

6. All persons are hereby enjoined and restrained from interference with the possession, title and rights of Applicant, as Liquidator, in and to the assets of Respondent and from interfering with the conduct of the liquidator in winding up of the business of Respondent;

7. All persons are hereby enjoined from the waste of assets of Respondent;

8. All persons are hereby enjoined from instituting or prosecuting any action or proceedings against Respondent, or Applicant as Liquidator of Respondent, without the consent of this court obtained after reasonable notice to said Liquidator;

9. All persons are hereby enjoined from obtaining preferences, judgments, attachments or other liens, or

making any levy against Respondent or its assets without the consent of this court obtained after reasonable notice to said Liquidator;

10. All officers, directors, agents and employees of Respondent are hereby ordered to deliver to said Liquidator all assets, books, records, equipment and other property of said Respondent;

11. All funds and bank accounts in the name of Respondent, or Applicant as Conservator, are hereby vested in said Liquidator and said funds shall be subject to withdrawal from said banks upon the order of said Liquidator only;

12. All insurance agents and brokers are hereby ordered to account to the Liquidator of Respondent for all funds of Respondent held by them in their fiduciary capacity, as specified in Sections 1733, 1734 and 1735 of the Insurance Code, or due to Respondent, and directed to forward said funds to Applicant as Liquidator, and said funds are vested in Applicant as Liquidator; and

13. Said Liquidator is hereby authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his function as Liquidator.

DATED: February 24, 1987.

/s/ Ricardo Torres
RICARDO TORRES
Judge of the Superior Court

[Filed Feb. 9, 1990]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C751868

ROXANI GILLESPIE, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA IN HER CAPACITY AS LIQUIDATOR OF MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, MISSION REINSURANCE CORPORATION, HOLLAND-AMERICA INSURANCE COMPANY,
Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY; AGF REINSURANCE CORP.; AMERICAN UNION INSURANCE CO. OF NEW YORK; ATLAS ASSURANCE COMPANY OF AMERICA; EMPLOYERS MUTUAL LIABILITY INSURANCE CORP.; HARBOR INSURANCE CO.; INA REINSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; LINCOLN NATIONAL REINSURANCE CO.; NEW ENGLAND REINSURANCE CORP.; NORTH AMERICAN CO. FOR PROPERTY AND CASUALTY; NORTHWESTERN NATIONAL INSURANCE CO.; PHOENIX ASSURANCE COMPANY OF NEW YORK; R.L.I. INSURANCE; SECURITY MUTUAL CASUALTY CO.; TRANSATLANTIC REINSURANCE CO.; TRINITY UNIVERSAL INSURANCE CO.; U.S. FIDELITY & GUARANTY CO.; VICTORY REINSURANCE CO. OF AMERICA; ZENITH INSURANCE COMPANY; and Does 1 thru 1000, inclusive
Defendants.

COMPLAINT FOR DECLARATORY RELIEF; SUIT ON CONTRACT; CONSPIRACY TO BREACH AND TO COMMIT TORTIOUS BREACH AND TORTIOUS BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING; CONSPIRACY TO COMMIT TORT AND TORTIOUS DENIAL OF THE EXISTENCE OF CONTRACTS

COMES NOW, the Plaintiff, Roxani Gillespie in her capacity as Liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Mission Reinsurance Corporation and Holland-America Insurance Company and makes this Complaint and for causes of action against the Named Defendants and Doe Defendants 1 through 1000 and alleges as follows:

PARTIES

1. Plaintiff, Roxani Gillespie, the Insurance Commissioner of the State of California, is the Court-appointed Liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Mission Reinsurance Corporation and Holland-America Insurance Company by orders of the Superior Court of the State of California for the County of Los Angeles in those certain cases entitled as follows: *The Insurance Commissioner of the State of California v. Mission Insurance Company*, Los Angeles Superior Court Case No. C572724; *The Insurance Commissioner of the State of California v. Mission National Insurance Company*, Los Angeles Superior Court Case No. C576321; *The Insurance Commissioner of the State of California v. Enterprise Insurance Company*, Los Angeles Superior Court Case No. C576325; *The Insurance Commissioner of the State of California v. Mission Reinsurance Company*, Los Angeles Superior Court Case No. C576416; and *The Insurance Commissioner of the State of California v. Holland-America Insurance Company*, Los Angeles Superior Court Case No. C576323.

2. Plaintiff Roxani Gillespie as Liquidator is vested with title to all assets, including causes of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Mission Reinsurance Corporation, and Holland-America Insurance Company (the "Mission Companies") and as such has the right to pursue the causes of action stated herein. The facts and circumstances giving rise to the allegations contained herein arise out of the same set of facts, circumstances and general reinsurance agreements in the lawsuit previously filed by Plaintiff herein, LASC Case No. C572724 currently pending in Department 67 of the above-entitled Court before the Honorable Kurt J. Lewin, the all-purpose judge in that action. The instant action was filed purely for procedural reasons and in form and substance is identical to the First Amended Complaint on file in LASC Case No. C572724.

3. The Named Defendants herein are insurance companies and/or associations of insurance companies who acted as reinsuring entities for the Mission Companies pursuant to certain written reinsurance agreements.

4. Plaintiff believes, and thereon alleges, that there are additional insurance companies and/or associations of insurance companies who reinsured business written by the Mission Companies and who refuse and continue to refuse to pay sums due under the reinsurance agreements to the Mission Companies, as will be described more fully below. The true names and capacities of these companies, sued herein under the fictitious names of Does 1 through 1000, are subject to the jurisdiction of this Court and are unknown to Plaintiff at the present time. Plaintiff will amend this complaint when and as such true names and capacities are ascertained. Doe Defendants 1 through 1000, and the Named Defendants herein are hereafter collectively referred to as "Defendants."

5. Defendants have failed and refused and continue to fail and refuse to pay sums due to the Mission Companies

in California as more particularly described herein below. Defendants are subject to the jurisdiction of the courts of California in that the reinsurance agreements provide for the submission of Defendants to the jurisdiction of any court of competent jurisdiction in the United States and some of the reinsurance agreements further appoint an agent for service of process in the State of California. Further, Defendants have done business in California and have purposefully availed themselves of insurance activities conducted in the State of California, in that, among other things, Defendants have received premiums from the Mission Companies, the Mission Companies being authorized to do business in California, Defendants have operated under sanction of California law and have caused payments to be delivered to the Mission Companies in California. Defendants have engaged systematically in an insurance business based upon companies being operated in the State of California and have purposely availed themselves of the benefits of business being done in this State and have availed themselves of the benefits of dealing with insurance companies operating in this State pursuant to a comprehensive state regulatory scheme. The business of insurance is of vital concern to this State and its public and the activities of Defendants both within and without the State have caused and are causing an effect within the State in that the Mission Companies have been damaged within the state by the acts and omissions of Defendants complained of herein. Further, these proceedings affect assets of the estates of the Mission Companies with respect to which this Court has exclusive jurisdiction which assets, in the form of the amounts alleged herein below, are being held by Defendants.

GENERAL FACTUAL STATEMENT

6. Beginning in the early 1970's, the Mission Companies entered into numerous written agreements with Defendants pursuant to which at all relevant times Defendants were and remain as reinsurers of insurance

policies issued directly by the Mission Companies to citizens of California and the other 49 states. Defendants became obligated to the Mission Companies to pay to the Mission Companies certain sums which sums were to be determined based upon losses experienced on various lines of insurance which were the subject of these agreements (the "Reinsurance Agreements").

7. All of the Reinsurance Agreements provide that Defendants shall pay to the Mission Companies all amounts due and owing for losses paid or payable by the Mission Companies on claims subject to the Reinsurance Agreements and provide for the recovery of certain other items of cost and expense.

8. With respect to the risks covered by the Reinsurance Agreements, there are three general categories of losses for which the Defendants are bound to pay. The first category involves policyholder claims made to the Mission Companies and paid by the Mission Companies and/or the various guarantee associations handling various of the policies of Mission Companies with respect to which Defendants have failed and refused and now fail and refuse to reimburse the Mission Companies even though Defendants are obligated to do so. The amounts due from Defendants in this connection exceed $15,800,000.00 which is part of over $400,000,000.00 due in this connection from all reinsurers and Plaintiff now seeks recovery from Defendants herein according to proof at trial.

9. The second category of such losses involves claims made against the Mission Companies with respect to which the Mission Companies have established case reserves and with respect to which the Mission Companies are, in the context, entitled to receive payment from Defendants. This amount due from Defendants in this connection exceeds $16,000,000.00 which is part of over $400,000,000.00 due in this connection from all rein-

surers and Plaintiff now seeks recovery from Defendants herein according to proof at trial.

10. The third category of losses involves a concept known as incurred-but-not-reported claims ("IBNR"). It is certain that an amount will be due from the Mission Companies to its insureds as a result of IBNR. It is possible, actuarially, to estimate with commercial reasonable certainty the amount of IBNR and thereby establish the amount due as IBNR from Defendants under the Reinsurance Agreements. This sum due from Defendants exceeds $55,000,000.00 which is part of over $1,600,000,000.00 due in this regard from all reinsurers and Plaintiff now seeks recovery from Defendants herein according to proof at trial. In the context as further described herein below, Plaintiff is entitled to recover from Defendants the present value of said IBNR and Plaintiff will present proof of such present value at trial or, alternatively, Plaintiff is entitled to have Defendants make provision for payment of IBNR according to proof at trial.

11. Defendants have failed and refused and continue to fail and refuse to pay or make provision for payment of these amounts. These amounts are more particularly ascertainable from Exhibit "A," attached hereto and incorporated herein for all purposes, which Exhibit sets forth specific amounts for the claims referred to in paragraphs eight, nine and ten above and which relate to data from which, in part, amounts in paragraph ten above are and can be calculated. Plaintiff reserves the right to amend Exhibit "A" after further discovery herein.

SPECIFIC FACTUAL ALLEGATIONS

12. In that it had become apparent to the California Department of Insurance that the continuing failure of Mission's reinsurers to pay balances due was placing a serious financial strain on the Mission Companies, in late 1985 the Department obtained orders of conservatorship

on all of the Mission Companies. Management of the Mission Companies, representatives of the Department and representatives of a group of insurance companies which had ceded reinsurance to the Mission Companies (the "participating ceding insurers") then began working on a plan to rehabilitate the Mission Companies.

13. A rehabilitation plan for the Mission Companies was announced by management of the Mission Companies on January 25, 1986, and formalized by a letter agreement dated February 10, 1986.

14. The rehabilitation plan contemplated Mission American Insurance Company assuming or reinsuring the insurance business of the Mission Companies and receiving the majority of the assets of the Mission Companies. Mission Insurance Company's obligations to the participating ceding insurers would be commuted in exchange for a surplus note issued by Mission American. The reinsurance recoverables would be assigned by Mission American to a trust to be distributed on infusion of capital into Mission American from American Financial Corporation.

15. In early March 1986, Defendants were apprised of the details of the proposed rehabilitation plan for the Mission Insurance Companies. Exhibit 1, attached hereto and incorporated herein by reference.

16. On March 12, 1986, a group of Mission's reinsurers, who later were to be represented by the law firm of Wilson, Elser, Moskowitz, Edelman and Dicker (the "WEMED defendants"), met in London and developed a strategy under which they "agreed to act together" in a "joint effort" to "continue to defer payment of balances due" to the Mission Companies. Part of this joint strategy was to commence an audit of a portion of Mission's reinsurance placed through Sayre & Toso, Inc. (the "Sayre & Toso business") and refuse payment on all of Mission's reinsurance on the pretext of awaiting the outcome of

the audit. At the time, Defendants, and the WEMED defendants, knew the amount of reinsurance balances due to the Mission Companies and were being regularly billed for balances by the Mission Companies, intermediaries and/or brokers. Exhibit 2, attached hereto and incorporated herein by reference.

17. On or about March 17, 1986, the Defendants were advised of the effort of the management of the Mission Companies and the Department of Insurance to rehabilitate the Mission Companies. The WEMED defendants concluded that this effort "does not change the strategy" to refuse payment of all reinsurance balances. Defendants continued to refuse payment in the face of requests for payment by the Mission Companies and in the face of the books and records of these Defendants showing "the latest position" on accounts due to the Mission Companies. Exhibit 3, attached hereto and incorporated herein by reference.

18. At their London meeting on March 12th, the WEMED defendants agreed to demand a joint audit of the Sayre & Toso business and agreed to hire the auditing firm of Norman Reitman and Company to conduct the audit. The Reitman Company established the format of the joint audit by letter of March 31, 1986, which audit was intended to "point out the degree of error, incorrect reporting and mishandling of the accounting" to put the WEMED defendants "in a position" with leverage to conduct settlement discussions with the Mission Companies. The Reitman Company's audit program was jointly drafted and guided by the WEMED defendants. The WEMED defendants did not expect the audit to produce any grounds to totally avoid their contractual obligations, but rather expected the audit to be useful leverage in settlement with the Mission Companies. Exhibit 4, attached hereto and incorporated herein by reference.

19. As of April 2, 1986, the WEMED defendants confirmed that the purpose of the Reitman audit was to "focus upon the potential degree of error" in the Sayre & Toso business, and to "key in" on "accuracy" and "whether any misrepresentations exist" before commencing settlement negotiations with the Mission Companies. The WEMED defendants therefore continued to pursue their joint strategy to refuse payments of all balances due to the Mission Companies and commence an audit of only the Sayre & Toso business to create a "favorable settlement climate." Exhibit 5, attached hereto and incorporated herein by reference.

20. At this time, the Defendants knew that the Mission Companies were in increasingly desperate financial shape due to the failure of the Defendants to pay reinsurance balances due. The WEMED defendants jointly continued to refuse all payments to the Mission Companies. Other Defendants either jointly or singly also refused to make any payments. The WEMED defendants believed that "any attempt at settlement negotiations prior to completing the [Reitman] audit would be premature and counterproductive unless reinsurers can supply us with the evidence of misrepresentation, fraud, concealment or negligence. Substantial deterioration in the figures in and of itself would not be enough to establish a favorable settlement climate." *Id.*

21. The WEMED defendants persisted in their joint strategy of refusing to pay any outstanding balance due to the Mission Companies. Exhibit 6, attached hereto and incorporated herein by reference.

22. Although the Mission Companies continued to request payment from the WEMED defendants through March, April and May 1986, the Defendants continued in their strategy and did not "agree to any requests for payment." The remaining Defendants continued to refuse payment either jointly or singly. The WEMED defend-

ants permitted the Reitman audit to proceed to look for any "pattern of errors, misrepresentations or omissions" on the Sayre & Toso business to provide the WEMED defendants with leverage over the financially troubled Mission Companies. Exhibit 7, attached hereto and incorporated herein by reference.

23. The WEMED defendants formed a "Steering Committee," established a legal and accounting fund and in May 1986 executed a Joint Cooperation Agreement to further their joint goals of refusing payments of all balances due to the Mission Companies. Further, the WEMED defendants devised a "detailed formula" to allocate costs and expenses among those party to the Joint Cooperation Agreement. During this time they jointly devised a formal cooperative audit strategy for the audit of the Sayre & Toso business and took the position that no payments would be made to the Mission Companies "until the audit is completed." Exhibits 7-12, attached hereto and incorporated herein by reference.

24. On May 14, 1986, the Reitman Company rendered its "Preliminary Informative Memorandum No. 1" (Exhibit 9, attached hereto and incorporated herein by reference) in which the Reitman Company outlined the voluminous records on the Sayre & Toso business, the special computer runs which would be required for "any kind of meaningful audit" and that "Mission's procedural operations are very sophisticated at the Home Office level." At the same time, while the WEMED defendants were being advised that the audit would require a lengthy review of Mission records and could not be swiftly concluded, the financial situation of the Mission Companies continued to deteriorate due to the failure of Defendants to pay balances due. Nevertheless, the WEMED defendants persisted in their joint strategy.

25. Although at the time they knew that the Reitman audit would involve a lengthy review of Mission files and

computer reports, and that the audit would not produce useful results, the WEMED defendants jointly represented to Mission management that it was their goal to complete the audit "as expeditiously as possible so that the settlement of all accounts which are validly and properly payable can be accomplished." The WEMED defendants knew that the desperate Mission management would rely on such false assurances of a rapid resolution of the balances due to the Mission Companies and possibly agree to a substantially discounted settlement in order to bring cash into the troubled companies. Exhibit 13, attached hereto and incorporated by reference.

26. Mission management requested the reinsurers "demonstrate their good intentions" by establishing a trust fund consisting of the paid losses outstanding and due to the Mission Companies by letter of June 5, 1986. Exhibit 14, attached hereto and incorporated herein by reference.

27. During June 1986, the WEMED defendants solicited other of Mission's reinsurers to join in the "cooperative and united effort" in order to improve the settlement and "bargaining position of the reinsurers." In fact, other reinsurers became clients of the WEMED firm after June 27, 1986, thereby adding to the number of reinsurers refusing to pay the Mission Companies and further weakening Mission's financial situation. Exhibit 15, attached hereto and incorporated herein by reference.

28. After the Reitman audit had commenced the WEMED defendants recognized that the sampling of files required "to present to a court in any trial of these issues" would have to be greater than the sampling Reitman contemplated by way of audit, but that it should be "sufficient to point out problems" and to use in an effort to force a settlement with Mission management. *Id.*

29. The WEMED defendants also believed that Mission's request for the establishment of a good faith trust

fund "would deter any allegation by Mission of a breach of contract." At this time, the WEMED defendants knew that "none of the treaties contain any provision specifically permitting the Reinsurers to refrain from payment based upon a dispute on the amounts individually." Nevertheless, the WEMED defendants continued in jointly and deliberately refusing to pay outstanding balances without any legal or factual basis and refused to establish a trust fund. *Id.*

30. In or about July 1986, the Defendants were updated on the status of the proposed rehabilitation plan for the Mission Companies. The Mission Companies continued to "press for payment of losses." The Defendants knowingly and without any factual or legal basis continued to refuse to pay to the weakened Mission Companies. The WEMED defendants jointly refused, insisting that no request for payment could be agreed to "until audit completed and full evaluation concluded." Exhibit 16, attached hereto and incorporated herein by reference.

31. In September 1986, the WEMED defendants held a meeting at the annual Monte Carlo Reinsurance Rendezvous where they received a report from the Reitman Company. Even though, on information and belief, this Report provided no concrete support for nonpayment, after this meeting they continued in their joint strategy of auditing the Sayre & Toso business and refusing to pay any balances due to the Mission Companies. Exhibit 17, attached hereto and incorporated herein by reference.

32. At or about the same time, the Commissioner in her capacity as Conservator of the Mission Companies wrote to all of Mission's reinsurers, including Defendants, requesting immediate payment of balances due. In that letter, the Commissioner advised all Defendants that "[T]o be successful, the rehabilitation plan, which benefits the industry and the public, requires the cooperation of all parties and most particularly, the receipt by Mission of

its reinsurance recoverables." Despite this request, and their knowledge that the rehabilitation plan required their payments, Defendants continued in refusing payments to the Mission Companies. Exhibit 18, attached hereto and incorporated herein by reference.

33. In early October 1986, the WEMED defendants from their own records compiled the balances due to the Mission Companies and yet jointly continued in their refusal to pay any losses. Exhibit 19, attached hereto and incorporated herein by reference.

34. Defendants were advised that "Mission is in a very poor cash position and there is a fear that the rescue plan will fail unless reinsurance proceeds are paid" and that the Commissioner requested a meeting with all of Mission's reinsurers, including the Defendants, to discuss outstanding payments. Exhibit 20, attached hereto and incorporated herein by reference.

35. At that meeting the Commissioner told Defendants of the Mission rehabilitation efforts and the necessity for them to pay balances due for the survival of the Mission Companies and the Defendants knew the key role they played in the survival of the Mission Companies. In deposition testimony elicited to date, the WEMED defendants have acknowledged that in late 1986 "we were aware of the need . . . for money in Mission . . . and hoped to reach an agreement because of it . . ." (Deposition of Jon Haralstad, May 23, 1989, pages 238-239). The WEMED defendants admit that they were apprised of the dire and critical situation of the Mission Companies during 1986 and knew their refusal to pay would cause the financial collapse of the Mission Companies. The WEMED defendants admit they "stood by their decision" not to pay and simply watched as the Mission Companies were forced into liquidation (Haralstad Deposition, pages 237 and 238; Deposition of Nigel Clark, March 15, 1989, pages 88-90; Deposition of Jean-Michel Pinto, March 15, 1989, pages 305-307).

36. Defendants understood at the time and understand today that their refusal to pay balances owed to the Mission Companies could result in extra-contractual damages being awarded against them, and they are willing to run that "risk." (Haralstad Deposition, pages 234-235; Clark Deposition, pages 88-89; Pinto Deposition, Pages 306-307; Deposition of Leonard Alliston, April 19, 1989, page 139).

37. After the meeting with the Commissioner, which occurred on October 9, 1986, the WEMED defendants held a meeting on October 22, 1986 in London to further discuss their joint strategy. The WEMED defendants understood that "Mission desperately needs cash to make the reorganization and rehabilitation plan work." The WEMED defendants knew that the Commissioner would serve reinsurers with a "financial damage law suit" if they withheld payment and Mission failed. Exhibit 21, attached hereto and incorporated herein by reference.

38. As of the October 22, 1986 meeting, the WEMED defendants did not believe that the Reitman audit would "turn up anything" allowing for recession. They recognized that they would "still have to pay" if no "gross negligence or fraud is indicated" and that the audit was expected only to uncover facts regarding problems with Sayre & Toso's claims handling rather than facts supporting recession. *Id.*

39. Defendants believed they could "take the opportunity made available by Mission's need for cash and negotiate a settlement or the [reinsurers] can stand by and watch Mission go under and then deal with the California Ins. Dept." Defendants understood that the Mission Companies were in a dramatically weaker bargaining position vis a vis the Defendants. *Id.*

40. The Reitman audit continued through November 1986 and the WEMED defendants continued in their joint strategy of non-payment. Exhibit 22, attached hereto and incorporated herein by reference.

41. On December 2, 1986, counsel for the Commissioner sent a letter to all Mission reinsurers, including Defendants, and advised them that "you hold in your collective power the success or failure of the many months of effort spent in attempting to rehabilitate these companies." Counsel urged Defendants to pay balances due to the Mission Companies and offered to settle all balances due under a formula contained in the correspondence. The Defendants continued to refuse to pay and refused to settle on the offered terms. Exhibit 23, attached hereto and incorporated herein by reference.

42. On December 18, 1986, the WEMED defendants met with counsel for Plaintiff to discuss potential settlement of their balances due from the reinsurers to the Mission Companies. The WEMED defendants were advised that the "passage of time and the deteriorating financial condition of Mission" were narrowing the options available to the Commissioner regarding Defendants and that their continuing refusal to pay would force the Companies into liquidation. Defendants were advised the Commissioner was unwilling to provide a "deep discount" in that there was no evidence of alleged "wrongdoing" on Mission's part. The WEMED defendants replied that they "could not even approach finalization of any commutation proposal" until they had "verifiable figures." The WEMED defendants recognized the extreme "financial pressure" facing Mission and that payment would "relieve that pressure." At this point the Reitman audit had been proceeding for nearly six months. Exhibit 24, attached hereto and incorporated herein by reference.

43. On December 28, 1986, the WEMED defendants were advised that Plaintiff had filed suit seeking payment of reinsurance balances due to the Mission Companies. The WEMED defendants expressed concern that "by making some payment, some of our negotiating strength is diminished." The WEMED defendants acknowledged this strategy was a "gamble" in that the "liquidator may

contend that reinsurers have caused the economic impairment of Mission and that the refusal to pay constitutes bad faith and is subject to an award of punitive damages." *Id.*

44. In this same communication, the WEMED defendants again acknowledge that "the strategy all along has been that we should not pay any losses pending an investigation and completion of certain phases of the Reitman audit." The WEMED defendants further acknowledged that "there is great danger in charges being made that the SORT reinsurers were instrumental in causing the total collapse of Mission." Despite all these warnings, their knowledge of their key role in the survival of Mission and the threat of the imminent collapse of the Mission Companies, Defendants deliberately continued to refuse to pay balances due. *Id.*

45. The WEMED defendants continued to cooperate in refusing to pay any balance due to the Mission Companies and to develop strategies to force the Commissioner into adversarial proceedings to collect the balances. Exhibit 25, attached hereto and incorporated herein by reference.

46. The Reitman audit report was due in early January 1987, and on December 29, 1986, the WEMED defendants were advised that "the audit will not be of great help for reinsurers" in their effort to uncover any fact to support an argument the contracts could be rescinded and their obligations to pay totally voided. Despite their knowledge that they had no facts to totally avoid their obligations, the WEMED defendants planned on using the report to "raise some defenses that may be used" in settlement negotiations with the Mission Companies. Exhibit 26, attached hereto and incorporated herein by reference.

47. Defendants nevertheless persisted in their refusal to pay the balances due to the Mission Companies. Exhibit 27, attached hereto and incorporated herein by reference.

48. As a result of the Defendants' failure to pay balances due to the Mission Companies, and Mission's financial crisis arising from this failure, on February 2, 1987, the Commissioner sought and later received orders of liquidation for the Mission Companies.

49. As a result of the conduct of Defendants and the resulting liquidation, the Mission Companies have been damaged in that Defendants refused to pay the hundreds of millions of dollars in reinsurance recoverables due and the Mission Companies suffered financial collapse as a result of this refusal.

50. To date, Defendants continue in refusing payment of any balances due to the Mission Companies, and continue to jointly cooperate in this effort and in similar strategies to continue denying the validity of the Reinsurance Agreements and jointly refusing to honor their obligations under the Agreements.

FIRST CAUSE OF ACTION

(For Declaratory Relief Against All Defendants)

51. Plaintiff refers to each and every allegation in paragraphs 1 through 50, inclusive, and incorporates the same by reference as though fully recited herein.

52. An actual controversy has arisen between Plaintiff and Defendants concerning the rights of the parties under the Reinsurance Agreements in that Plaintiff and the Mission Companies have demanded that Defendants pay or make provision to pay the amounts described above. Defendants however deny that they are required to do so and have refused to pay or to make provision for payment as alleged above. An actual and justiciable controversy therefore exists between Plaintiff and Defendants concerning their respective rights under the contracts and a judicial determination and declaration is necessary and

appropriate at this time as to the rights of the parties under the Reinsurance Agreements in order that Plaintiff perform her statutory duties and in order that the innocent policyholders of the Mission Companies may be afforded their rights.

53. Plaintiff seeks a declaratory judgment of the Court determining the rights, duties and obligations by and between the Mission Companies and Defendants as to the repayment of losses, expenses and other recoverable items paid by the Mission Companies on claims subject to the Reinsurance Agreements referred to herein and as to the other two categories of losses covered by the Reinsurance Agreements and all other sums due to the Mission Companies thereunder.

SECOND CAUSE OF ACTION

(Suit on Contract Against All Defendants)

54. Plaintiff refers to each and every allegation in paragraphs 1 through 50, inclusive, and incorporates the same by reference as though again fully recited herein.

55. Defendants fail and refuse and have failed and refused to pay and/or to make provision for payment to the Mission Companies on the Reinsurance Agreements as described more fully above.

56. Plaintiff has performed under the Reinsurance Agreements and/or Plaintiff's performance under the contracts has been excused.

57. Defendants are therefore in breach of contract and Plaintiff has therefore been damaged.

58. Plaintiff hereby seeks payment from Defendants of the sums due under the Reinsurance Agreements, in an amount to be proven at trial. Further, Plaintiff is entitled to special and consequential damages for Defendant's breach of contract. When Defendants entered into the Reinsurance Agreements with the Mission Companies,

they knew that they were agreeing to reinsure risks ceded by the Mission Companies and to pay their share of losses incurred from these risks. As described above, at the time the Defendants knew that their failure to pay the balances due would cause great hardship, and perhaps the financial failure of the Mission Companies.

59. As described in greater detail above, Plaintiff and her representatives corresponded and met with Defendants and their agents or representatives during 1986 in an effort to obtain payments from Defendants of balances due. On a number of occasions, Plaintiff advised Defendants that if they failed to pay reinsurance balances, Mission would face financial ruin and be forced into liquidation. The deposition testimony elicited to date, in addition to the Exhibits attached hereto, all of which are incorporated herein, shows Defendants knew that their failure to pay reinsurance balances due to the Mission Companies would cause Mission's liquidation.

60. Despite these warnings, and despite their knowledge that they held the key to Mission's financial future in their hands, Defendants knowingly and intentionally withheld payments due under the Reinsurance Agreements.

61. Based upon this course of conduct, Plaintiff is entitled to special damages in an amount equivalent to the losses suffered by Mission as a result of the liquidation forced by Defendants' conduct, which amount is currently being calculated and which is anticipated to exceed $2 billion and which amount will be proven at the time of trial.

THIRD CAUSE OF ACTION

(Conspiracy to Breach and to Commit Tortious Breach and Breach and Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing Against Does 500 through 1000)

62. Plaintiff refers to each and every allegation in paragraphs 1 through 50, inclusive, and incorporates the same by reference as though again fully recited herein.

63. Insurance companies supply a service affected with the public interest. The major motivation for the public to purchase insurance is to provide for security and peace of mind through the protection against calamity. This undertaking by an insurer to provide peace of mind and security against loss creates a special relationship with the insured.

64. The Mission Insurance Companies wrote property and casualty and workers' compensation insurance policies. These policies were issued to the public. Defendants, as reinsurers of the Mission Companies, by way of the Reinsurance Agreements, agreed to reinsure a portion of this business. Implied in all of these Agreements is a covenant by Defendants that they will act in good faith and deal fairly with the Mission Companies. When entering into these Agreements, Defendants knew that they were agreeing to reinsure policyholder risks ceded by the Mission Companies and to pay their share of losses incurred by these policyholders.

65. Defendants, as experienced reinsurance professionals, knew that their liability under the agreements arose from the insurance policies issued by the Mission Companies to the public. Testimony elicited to date from Defendants acknowledges that the reinsurers understood this fact (Deposition of John T. Jones, December 15, 1988, pages 65 and 71; Pinto Deposition, pages 254-256).

66. Defendants also knew that the Mission Companies could write insurance policies only to the extent the Mission Companies possessed appropriate statutory capital and surplus. Defendants knew that the Mission Companies purchased reinsurance to provide relief to Mission's capital and surplus and thereby enable the Mission Companies to write more insurance policies to the insurance buying public as provided in Insurance Code § 922.2. Defendants knew that the Mission Companies and the

insurance regulator relied on Defendants to honor the Reinsurance Agreements in evaluating their capital and surplus in deciding to write policies to the public.

67. Defendants knew that if they jointly and in a cooperative effort refused to honor the Reinsurance Agreements, it would place the Mission Companies in extreme financial distress and cause the Mission Companies to cease writing policies. Defendants knew their joint conduct would create dramatically unequal bargaining position vis a vis the Mission Companies. Defendants knew that such distress and unequal position could result in the downfall of the Mission Companies and that the ultimate financial burden of the insolvency would fall on policyholders of the Mission Companies and the insurance-buying public in general.

68. As more fully set forth above, in breach of the implied covenant of good faith and fair dealing these Defendants have committed the acts alleged herein, knowingly, intentionally, unreasonably and wrongfully for the purpose of withholding benefits due to the Mission Companies under the Reinsurance Agreements by, among other things, developing a joint strategy to refuse payment of balances due in the face of repeated requests for payment and the certain knowledge that their refusal to honor the Reinsurance Agreements would bring about the downfall of the Mission Companies and bring extreme financial burden on the policyholders and the insurance-buying public.

69. As is amply demonstrated by Exhibits 1-27, attached hereto and incorporated herein by reference, these Defendants knew that they could develop a joint strategy of refusing to pay the Mission Companies and could by this concerted effort bring about the downfall of the Mission Companies. The Defendants did just that by entering into a Joint Cooperation Agreement, forming a Steering Committee, instructing the Norman Reitman Company to conduct an audit of the Sayre & Toso busi-

ness only and jointly refusing to pay all balances due with no legal or factual basis for the refusal.

70. Defendants have knowingly, intentionally and unreasonably failed to meet their obligations with regard to the balances tendered by the Mission Companies which arise from the thousands of legitimate claims presented by the innocent policyholders of the Mission Companies.

71. Defendants acted and continue to act maliciously and oppressively in jointly developing a strategy and implementing that strategy in refusing to pay any balances due under the Reinsurance Agreements solely for the purpose of illegally, improperly, and maliciously increasing their profits at the expense of the Mission Companies and their innocent policyholders.

72. Defendants acted and continue to act contemptibly in jointly banding together in a coordinated effort and thereby denying and refusing to pay the amounts due pursuant to the Reinsurance Agreements solely for the purpose of illegally, improperly, and maliciously forcing the Plaintiff into litigation to collect legitimate balances due pursuant to the Reinsurance Agreements all to the detriment of the Mission Companies and their innocent policyholders.

73. As described in detail above, Defendants are not dealing fairly with the Mission Companies. Such conduct is unconscionable and Defendants knew at the time they entered into their joint strategy that a risk they would run was Plaintiff bringing litigation and a claim for extra-contractual damages. That Defendants know that the innocent policyholders of the Mission Companies are dependant upon the payment of the balances due under the Reinsurance Agreements for the satisfaction of their claims renders their conduct even more despicable.

74. Defendants, by the continuing course of conduct as more fully set forth above, have breached and continue to breach their duty of good faith and fair dealing

causing substantial damage to the Mission Companies and ultimately to the innocent policyholders in an amount to be shown at trial.

75. Plaintiff believes that the acts and conduct of the Defendants and each of them were committed with the intent to vex, annoy and injure the Mission Companies and the innocent policyholders and with reckless disregard of the consequences to the Mission Companies and the policyholders. The conduct of these Defendants was carried out and is being carried out by officers, directors or managing agents of the Defendants and exemplary damages are therefore appropriate. Plaintiff is thus entitled to recovery from Defendants exemplary damages in an amount to be proven at trial.

FOURTH CAUSE OF ACTION

(Conspiracy to Commit Tort and the Tortious Denial of the Existence of the Reinsurance Agreement Against Does 500 through 1000)

76. Plaintiff incorporates by reference paragraphs 1 through 50 and 63 through 74 above and incorporates them by reference as though fully set forth herein.

77. As more fully set forth above, these Defendants knew of the dire financial condition of the Mission Companies. The primary reason for the liquidation of the Mission Companies is the refusal of Defendants to honor the Reinsurance Agreements.

78. The seriousness of the financial situation of the Mission Companies as a result of Defendants' conduct placed the parties in a dramatically unequal bargaining position with regard to honoring the Reinsurance Agreements. These Defendants were repeatedly advised at the time that the financial condition of the Mission Companies made the Mission Companies and their innocent policyholders especially vulnerable to the harm contemplated by the Defendants in their refusal to pay the

balances due. Defendants were well aware of this vulnerability and in deposition testimony elicited to date as described above, Defendants acknowledge their understanding that the risk of this course of conduct could be extra-contractual damages due from them to Plaintiff.

79. Defendants denied at the time and continue to deny any liability under the Reinsurance Agreements without any good faith belief in the propriety of their denials as more specifically described above, including but not limited to the following conduct:

a) Jointly refusing and continuing to refuse to honor all of the Reinsurance Agreements but commencing an audit on only the Sayre & Toso portion of the business;

b) Jointly refusing and continuing to refuse to honor the Reinsurance Agreements with the knowledge that the Agreements did not permit such conduct;

c) Jointly refusing and continuing to refuse to honor the Reinsurance Agreements allegedly on the basis of information contained in the Reitman Report while knowing that the Report "would not be of great help" in legally or factually supporting their complete refusal to honor all of the Agreements

d) Jointly refusing to honor the Reinsurance Agreements with the certainty that such conduct would push the Mission Companies into liquidation and bring great financial burden on the Mission policyholders and the insurance-buying public; and

e) Jointly refusing and continuing to refuse to honor the Agreements with no legal or factual basis for such a refusal and forcing Plaintiff to initiate litigation regarding Defendants' obligations under the Agreements.

80. The documents attached as Exhibits 1-27, incorporated herein, outline Defendants' joint strategy to cooperate in refusing to honor the Reinsurance Agreements. Defendants have jointly stonewalled Plaintiff in a concerted effort in refusing to honor the Agreements and pay the balances due with the intent of forcing the Plaintiff into litigation to collect the balances due under the Reinsurance Agreements.

81. The documents attached hereto as Exhibits 1-27, as more fully described above and incorporated herein, demonstrate that Defendants' acts and conduct described above were made with the intent to coerce the Plaintiff and the Mission Companies and ultimately the innocent policyholders to accept a sum less than the sum actually due from the Defendants in full payment of the Defendants' obligations.

82. Testimony of some Defendants elicited to date demonstrates that some Defendants actually knew, and the others should have known, that the ultimate results of their actions would be to injure the thousands of innocent policyholders of the Mission Companies and the Mission estates, which injury has occurred. Plaintiff is therefore entitled to damages according to proof at trial.

83. The acts and conduct of these Defendants described in detail above and in Exhibits 1-27, incorporated herein, and each of them were committed with the intent to vex, annoy and injure the Mission Companies and the innocent policyholders with the reckless disregard of the consequences to the Mission Companies and the policyholders. The conduct of these Defendants was carried out and is being carried out by officers, directors or managing agents of the Defendants and exemplary damages are therefore appropriate. Plaintiff is thus entitled to recover from Defendants exemplary damages in an amount to be proven at trial.

WHEREFORE, Plaintiff prays judgment against Defendants, and each of them, as follows:

1. For a declaration of the rights of the parties under the Reinsurance Agreements and a declaration stating amounts that Defendants are obligated to pay to Plaintiff,

on behalf of the Mission Companies; the amount currently due and owing from each Defendant to the Mission Companies on losses paid or payable by the Mission Companies, including paid losses and case reserves, and that Defendants have the obligation to pay the present value of IBNR or to make provision for payment of IBNR and to pay future amounts as they come due for IBNR;

2. On Count Two, for the amounts due on losses paid and payable for costs, expenses and other recoverable items in an amount to be proven at trial and for special damages in an amount to be determined at trial;

3. On Count Three, for damages according to proof at trial;

4. On Count Three, for punitive damages in an amount to be proven at trial;

5. On Count Four, for damages according to proof at trial;

6. On Count Four, for punitive damages in an amount to be proven at trial;

7. For costs of suit herein;

8. For reasonable attorneys' fees; and

9. For such other and further relief as the Court may deem just and proper.

Dated: February 8, 1990

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Attorney General of the
State of California

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JACK T. KERRY,
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By: /s/ Melissa S. Kooistra
MELISSA S. KOOISTRA
Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C751868

(Title Omitted in Printing)

NOTICE OF RELATED CASES

Plaintiff Roxani Gillespie, Insurance Commissioner of the State of California, in her capacity as Liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Mission Reinsurance Corporation and Holland-America Insurance Company, files this Notice of Related Cases pursuant to Los Angeles Superior Court local Rule 1103.6.1. This case involves the efforts by the Commissioner to recover assets of the estates of the Mission Insurance Companies, specifically, reinsurance recoverables owed to those estates. Presently, there are consolidated actions pending in this Court before the Honorable Kurt J. Lewin, Department 67, who is the all-purpose judge assigned to the Mission Liquidation proceedings which have the lead case number of C572724. In form and substance this matter is virtually identical to one of those consolidated matters, Case No. C629709, in which action the Commissioner also seeks recovery of reinsurance recoverables owed to these estates. It would entail a substantial duplication of the Court's time and effort if these matters were heard by different judges.

Dated: February 8, 1990

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Attorney General of the
State of California

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By: /s/ Melissa S. Kooistra
MELISSA S. KOOISTRA
Attorneys for Plaintiff

[Filed Apr. 25, 1990]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C572724

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
Petitioner,
v.
MISSION INSURANCE COMPANY,
a California corporation,
Respondent.

Case No. C576324

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
Applicant,
v.
MISSION NATIONAL INSURANCE COMPANY,
a California corporation,
Respondent.

Case No. C576416

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
Applicant,
v.
MISSION REINSURANCE CORPORATION,
a Missouri corporation,
Respondent.

Case No. C576323

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
Applicant,
v.
HOLLAND-AMERICA INSURANCE COMPANY,
a Missouri corporation,
Respondent.

Case No. C576325

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
Applicant,
v.
ENTERPRISE INSURANCE COMPANY,
a California corporation,
Respondent.

Case No. C634774

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
Applicant,
v.
MISSION AMERICAN INSURANCE COMPANY,
a California corporation,
Respondent.

Case No. C682377

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
Applicant,
v.
COMPAC INSURANCE COMPANY,
a California corporation,
Respondent.

Case No. C683233

ROXANI GILLESPIE, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HER CAPACITY AS LIQUIDATOR OF MISSION INSURANCE COMPANY,

Plaintiff,

v.

ABEILLE-PAIX REASSURANCES, *et al.*,

Defendants.

Case No. C629709

ROXANI GILLESPIE, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HER CAPACITY AS LIQUIDATOR OF MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, MISSION REINSURANCE CORPORATION, HOLLAND-AMERICA INSURANCE COMPANY,

Plaintiffs,

v.

ABEILLE-PAIX (L'), *et al.*,

Defendants.

FINAL ORDER OF REHABILITATION

IT IS HEREBY FOUND AND ORDERED AS FOLLOWS:

1. Roxani Gillespie, Insurance Commissioner of the State of California, in her capacity as domiciliary Liquidator of Mission Insurance Company, Mission National Insurance Company and Enterprise Insurance Company, as ancillary liquidator of Holland-America Insurance Company and Mission Reinsurance Corporation, and as conservator of Mission American Insurance Company and Compac Insurance Company (hereinafter "the Receiver") has complied with the provisions of that certain Order Of Rehabilitation, Establishment of Hearing Date and Notice

Procedures entered in these proceedings (the "Preliminary Order") to which reference is hereby made for further detail. The provisions of the said Preliminary Order are hereby reaffirmed and continued except to the extent directly inconsistent with the provisions of this Order. All terms used herein, unless otherwise stated, shall have the same meaning as they have in the Agreement of Reorganization, Rehabilitation and Restructuring (the "Rehabilitation Agreement").

2. The Court finds that the Receiver has complied with the notice provisions of paragraph 4 of the Preliminary Order and that due, fair, sufficient and proper notice of the Hearing of the Receiver's Motion for Instructions and Motion for Approval of Agreement of Reorganization, Rehabilitation and Restructuring (the "Receiver's Motion") was provided to all persons and entities entitled thereto.

3. Full and fair opportunity was afforded to all persons and entities appearing either in person or by counsel and to all other persons and entities interested in these proceedings to present such comments, suggestions, arguments and objections as they might desire and to present such relevant evidence as they may desire with regard to the Receiver's Motion, to the Preliminary Order, to the commencement or conduct of these proceedings, to the Rehabilitation Agreement, the Partial Settlement Agreement (as defined below) or to the transactions contemplated and described therein.

4. The Rehabilitation Plans, the Partial Settlement Agreement and the transactions contemplated therein are a reasonable exercise of the state's police power, through the Receiver, and are not arbitrary, capricious or improperly discriminatory.

5. The Court has fully considered all comments, suggestions, arguments and objections that were presented at the Hearing and all objections to the Rehabilitation

Plans which were made or which could have been made at the Hearing and all such objections are hereby, in every respect and in all things, overruled. The Receiver's Motion, the Rehabilitation Plans described therein, and the transactions contemplated in the Rehabilitation Agreement described therein are hereby granted and approved.

6. The Receiver is hereby authorized to proceed to close the transactions set out in the Rehabilitation Agreement and, without further order of this Court, to perform all of the obligations, terms, conditions, provisions thereof, and to take all such actions and execute all such other and further documents, including but not limited to assignments, documents of title and any other document of any kind or nature as may be necessary or convenient to close the said transactions and to effectuate the purpose and intent of the Rehabilitation Plans.

7. This Court continues and reaffirms its assumption of exclusive and continuing jurisdiction over all of the Transferred Assets of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Holland-America Insurance Company and Mission Reinsurance Corporation (hereinafter, collectively, the "Mission Insurance Subsidiaries") Mission American Insurance Company and Compac Insurance Company (hereinafter, collectively, "Mission American") and hereby continues such assertion and assumption of jurisdiction to the exclusion of all others and, further, asserts and continues to assume sole and exclusive jurisdiction to administer the Transferred Assets and to determine the validity or invalidity of any and all claims to or affecting such assets. Further, without limitation of this Court's jurisdiction as a matter of law, the Court also retains jurisdiction with respect to the Rehabilitation Agreement, the Partial Settlement Agreement and with respect to any and all transactions contemplated therein, including, but not limited to the adjudication of any and all disputes arising out of or in connection with the terms thereof or the transactions contemplated therein.

8. The Trusts of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company and the Mission American Trust shall be administered by the Insurance Commissioner of the State of California and her successors in office, *ex officio*, as Trustee. The Trustee may appoint one or more Deputy Trustees and Counsel for the Trusts. The Trusts of Holland-America Insurance Company and Mission Reinsurance Corporation shall be administered, in accordance with the Agreement Between Liquidators dated July 1, 1988 and in accordance with the terms of the Trusts, and the Missouri Director of Insurance in his capacity as domiciliary Receiver (the "Director") shall be Trustee. All current work in progress regarding the Mission Insurance Companies and Mission American and the benefits of all past work shall be transferred to and preserved for the benefit of the Trusts.

9. With respect to the Transferred Assets of the Mission Insurance Companies and Mission American, this Court specifically finds that all rights, remedies or causes of action possessed by the Receiver or the Director, whether currently existing or arising in the future, are preserved and transferred to the Trusts, including, but not limited to, the causes of action for reinsurance recoverables and bad faith asserted in the *Abeille-Paix* Litigation and the claims asserted in the Collection Litigation, and that such rights, remedies and causes of action and all other claims shall continue without any change in form or substance as before this Court's approval of the Rehabilitation Agreement.

10. Actual notice was provided to the guaranty association, guaranty fund or other similar entity of each state of the Hearing, the Receiver's Motion, the Rehabilitation Agreement and the Rehabilitation Plans contained therein. All obligations, liabilities and other rights and duties of those guaranty associations, guaranty funds or similar entities of the several United States to the policy-

holders and claimants of the Mission Insurance Companies shall continue unabated in conjunction with this Court's approval of the Rehabilitation Agreement and the Rehabilitation Plans contained therein and there shall be no change, abrogation, alteration or other modification of the obligations and rights of these guaranty associations as a result of this Court's order or the transactions contemplated in the Rehabilitation Agreement or the Rehabilitation Plans.

11. All persons and entities are hereby enjoined from instituting or maintaining any action at law or suit in equity of any kind or nature, including, but not limited to matters in arbitration, against the Trusts of the Mission Insurance Subsidiaries, or the Mission American Trust, the Receiver, the Director, the Trustees, their Deputy Trustee(s), their Counsel or any of their agents, employees, consultants or anyone acting under their direction, and from attaching or executing upon or taking any legal proceedings against any of the Transferred Assets of the Mission Insurance Subsidiaries or Mission American and from doing any act interfering with the conduct of the business of the Trusts by the Trustees or with the dominion and control of the Trustees over these Transferred Assets and from interfering with any provision of this Order or the Rehabilitation Agreement or the transactions contemplated in connection therewith, except after an order of this Court, obtained after reasonable notice to the Trustees.

12. At such time as the Commissioner notifies this Court that all conditions precedent to closing the contemplated transactions have occurred, and that she has been satisfied as to all related tax issues, then: (a) Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Holland-America Insurance Company and Mission Reinsurance Corporation shall be released, discharged, and dismissed from the current liquidation proceedings pending before

this Court free of any claims and liabilities of any kind whatsoever and such liquidation proceedings then will be terminated as to these companies. These proceedings shall continue as to the Trust estates of these companies which trust estates shall function as liquidating insurance entities subject to the Commissioner's powers under the Insurance Code; (b) Mission American Insurance Company and Compac Insurance Company shall be released, discharged, and dismissed from the current conservatorship proceedings pending before this Court free of any claims and liabilities of any kind whatsoever and such conservatorship proceedings then will be terminated as to these companies. These proceedings shall continue as to the Trust estates of these companies which trust estates shall function as liquidating insurance entities subject to the Commissioner's powers under the Insurance Code; and (c) the names of the Mission Insurance Subsidiaries and Mission American shall be changed as follows: (i) the name of Mission Insurance Company shall be changed to Danielson Insurance Company, (ii) the name of Mission National Insurance Company shall be changed to Danielson National Insurance Company; (iii) the name of Enterprise Insurance Company shall be changed to Danielson-Heffernan Insurance Company; (iv) the name of Holland-America Insurance Company shall be changed to Danielson-Rhein Insurance Company; (v) the name of Mission Reinsurance Corporation shall be changed to Danielson Reinsurance Corporation; (vi) the name of Mission American Insurance Company shall be changed to Danielson American Insurance Company; and (vii) the name of Compac Insurance Company shall be changed to Danielson-Whitman Insurance Company.

13. The Partial Settlement Agreement dated as of December 13, 1989 between, among others, the Receiver, Director and the Settling Cross-Defendants (the "Partial Settlement Agreement") is approved and, in such connection, at such time as the Receiver notifies this Court that all conditions precedent to closing the contemplated

transactions have occurred, and that she has been satisfied as to the tax issues, then the claims to be released by the Receiver and the Director in Paragraph 3 thereof will be dismissed with prejudice and the Receiver's indemnity claims as provided in Paragraph 4 thereof will be dismissed without prejudice.

/s/ Kurt J. Lewin
HON. KURT J. LEWIN
DATED: Apr. 25, 1990 Judge of the Superior Court

[Proof of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.

ROXANI GILLESPIE, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HER CAPACITY AS LIQUIDATOR OF MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, MISSION REINSURANCE CORPORATION, HOLLAND-AMERICA INSURANCE COMPANY, *Plaintiff*,

v.

ALLSTATE INSURANCE COMPANY; AGF REINSURANCE CORP.; AMERICAN UNION INSURANCE CO. OF NEW YORK; ATLAS ASSURANCE COMPANY OF AMERICA; EMPLOYERS MUTUAL LIABILITY INSURANCE CORP.; HARBOR INSURANCE CO.; INA REINSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; LINCOLN NATIONAL REINSURANCE CO.; NEW ENGLAND REINSURANCE CORP.; NORTH AMERICAN CO. FOR PROPERTY AND CASUALTY; NORTHWESTERN NATIONAL INSURANCE CO.; PHOENIX ASSURANCE COMPANY OF NEW YORK; R.L.I. INSURANCE; SECURITY MUTUAL CASUALTY CO.; TRANSATLANTIC REINSURANCE CO.; TRINITY UNIVERSAL INSURANCE CO.; U.S. FIDELITY & GUARANTY CO.; VICTORY REINSURANCE CO. OF AMERICA; ZENITH INSURANCE COMPANY; and Does 1 thru 1000, inclusive, *Defendants*.

NOTICE OF REMOVAL OF CIVIL ACTION

TO THE PARTIES HERETO AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Allstate Insurance Company (hereinafter "Allstate") hereby removes this action from the Superior Court of the State of California for the County of Los Angeles to the United States District Court for the Central District of California. The grounds for removal are as follows:

1. Allstate is named as defendant in a civil action filed in the Superior Court for the State of California for the County of Los Angeles, Case No. C 751868, entitled *"Roxani Gillespie, Insurance Commissioner of the State of California, in her capacity as liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Mission Reinsurance Corporation, Holland-America Insurance Company vs. Allstate Insurance Company; AGF Reinsurance Corp.; American Union Insurance Co. of New York; Atlas Assurance Company of America; Employers Mutual Liability Insurance Corp.; Harbor Insurance Co.; INA Reinsurance Company; Insurance Company of North America; Lincoln National Reinsurance Co.; New England Reinsurance Corp.; North American Co. for Property and Casualty; Northwestern National Insurance Co.; Phoenix Assurance Company of New York; R.L.I. Insurance; Security Mutual Casualty Co.; Transatlantic Reinsurance Co.; Trinity Universal Insurance Co.; U.S. Fidelity & Guaranty Co.; Victory Reinsurance Co. of America; Zenith Insurance Company; and Does 1 thru 1000, inclusive."* Petitioner was served with process in this case on August 2, 1990.

2. At the time of commencement of said action and at all times thereafter, Allstate was and still is a corporation incorporated under the laws of the State of Illinois, with its principal places of business in Illinois.

3. At the time of commencement of said action, plaintiff was and still is a citizen of California.

4. Although fictitiously-designated Defendants Does 1 through 1000 are referred to in the Complaint, such

fictitiously-designated Defendants are to be disregarded for purposes of diversity pursuant to 28 U.S.C. § 1441 (a).

5. This action is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1332(a)(2) and is one which Allstate is entitled to remove to this Court pursuant to 28 U.S.C. § 1441(c), in that the matter in controversy exceeds the sum of fifty thousand dollars ($50,000), exclusive of interest and costs; the action is between citizens of different states; and this action is properly removable by Allstate because the claims alleged in the Complaint as to Allstate are "separate and independent" from the claims alleged against other, non-diverse defendants. The only claims asserted in the Complaint against Allstate, for alleged breach of reinsurance agreements entered into by Allstate and the Mission Group of Insurance Companies, allege a different wrong and seek recovery for a different injury than the claims alleged against the other defendants, who are sued for alleged breaches of separate reinsurance agreements to which Allstate was and is not a party.

6. Allstate hereby files this Notice of Removal of Civil Action within thirty days of its receipt on August 2, 1990 of the initial pleading setting forth the claim for relief upon which the action is based and within one year of the commencement of the action pursuant to 28 U.S.C. §§ 1446(a) and (b).

7. Pursuant to 28 U.S.C. § 1445(a), attached hereto as Exhibits A and B, respectively, are copies of the Summons and Complaint served upon Allstate in the above-referenced case. Attached hereto as Exhibit C is a copy of a Notice of Related Case therein. Attached hereto as Exhibits D and E, respectively, are Plaintiff's First Set of Interrogatories Directed to Defendant Allstate Insurance Company and Plaintiff's First Set of Demands for Inspection of Documents to Defendant Allstate Insurance Company. The pleadings attached hereto as Exhibit A

through E, inclusive, constitute all the process and pleadings served upon Allstate in the above-referenced Superior Court action.

WHEREFORE, Defendant Allstate hereby removes to this Court the above-referenced action pending against it in the Superior Court of the State of California, County of Los Angeles.

DATED: August 30, 1990

MUNGER, TOLLES & OLSON
MELVYN H. WALD
JOSEPH D. LEE

By /s/ Joseph D. Lee
JOSEPH D. LEE
Attorneys for Defendant
Allstate Insurance Company

[Exhibits A and B—Summons and Complaint in *Gillespie v. Allstate*, LASC Case No. C751868, omitted in printing.]

[Exhibit C—Notice of Related Case in *Gillespie v. Allstate*, LASC Case No. C751868, omitted in printing.]

[Exhibits D and E—Discovery propounded on Allstate in *Gillespie v. Allstate*, LASC Case No. C751868, omitted in printing.]

[Filed Sep. 10, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

NOTICE OF MOTION AND MOTION OF ALLSTATE INSURANCE COMPANY TO COMPEL ARBITRATION AND STAY PROSECUTION

TO THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, TO ALL OTHER PAR,-TIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 1, 1990, at 10:00 a.m. or as soon thereafter as the matter may be heard, in Courtroom 9 of the above-entitled Court, located at 312 North Spring Street, Los Angeles, California, Defendant Allstate Insurance Company ("Allstate"), will and hereby does move for an order compelling arbitration of this action insofar as it is asserted against Allstate Insurance Company and otherwise staying the prosecution of this action as against Allstate. This motion is made pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-9, on the ground that the reinsurance agreements at issue in this action, insofar as the action is stated against Allstate, provide for binding arbitration of any disputes thereunder.

This motion is based on the accompanying Memorandum of Points and Authorities and Declaration of David Brodnan, on the [Proposed] Order Compelling Arbitration and Staying Prosecution lodged herewith, on the pleadings and papers on file herein, and on such further matters as may be presented in a reply memorandum or at the hearing on this motion.

DATED: September 7, 1990

MUNGER, TOLLES & OLSON
MELVIN H. WALD
JOSEPH D. LEE

By /s/ Joseph D. Lee
JOSEPH D. LEE
Attorneys for Defendant
Allstate Insurance Company

[Filed Sep. 10, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF ALLSTATE INSURANCE COMPANY TO COMPEL ARBITRATION AND STAY PROSECUTION

I.

INTRODUCTION

Defendant Allstate Insurance Company ("Allstate") seeks an order compelling arbitration of a dispute between it and the California Insurance Commissioner, as liquidator of four members of the Mission Group of Insurance Companies. The dispute arises from Allstate's having been both reinsured by and a reinsurer of the Mission Group under a number of reinsurance agreements entered into between 1961 and 1985. As reinsurer, Allstate owes reinsurance balances of approximately $7 million to the Mission Group; as a reinsured, Allstate is due reinsurance balances of roughly $13 million from the Group. Allstate has asserted its right to set off the balances due it against any sums due to the Mission Group, as provided for by section 1031 of the California Insurance Code. The Commissioner disputes this position and seeks to compel payment from Allstate without setoff.

With a handful of exceptions, each of the reinsurance agreements between Allstate and the Mission Group provides for arbitration of any dispute between them. By this motion, Allstate seeks to enforce these express contractual terms. As demonstrated below, the Federal Ar-

bitration Act and the strong federal policy of encouraging the arbitration of disputes mandates the entry of an order compelling arbitration here. Indeed, the arbitration of reinsurance disputes is particularly to be encouraged. The types of issues presented are unique to the reinsurance context, so that experienced industry arbitrators, as required under the agreements, are particularly well suited to resolve reinsurance disputes. For precisely this reason, the reinsurance industry for decades has almost uniformly followed arbitration as a course for resolving this very kind of dispute. Not to compel arbitration would contravene not only the parties' express intention under the reinsurance agreements at issue but also unambiguous provisions of the Federal Arbitration Act.

The Mission Group's agreement to submit this dispute to arbitration is fully binding on the California Insurance Commissioner. As demonstrated below, several decisions have held that statutory liquidators of an insolvent insurer must submit to arbitration disputes arising under pre-liquidation arbitration agreements, just like those here. The rationale of these decisions is compelling and is equally applicable here: the Commissioner stands in the Mission Group's shoes, and has no greater power than the Mission Group would have to avoid its arbitration agreements. For each of the foregoing reasons, the Court should compel arbitration of this action.

II.

FACTUAL BACKGROUND

A. *The Reinsurance Agreements.*

Between 1962 and 1984, Allstate and the Mission Group entered into a large number of agreements which provided for the sharing of certain insurance risks between them. The agreements fall into two basic categories: (1) a series of agreements pursuant to which Allstate (through its Reinsurance Division) reinsured the Mission Group,

and (2) agreements between the Mission Group and Northbrook Excess and Surplus Insurance Co. ("NESCO"), formerly a wholly-owned subsidiary of Allstate that was merged into Allstate in January 1985, under which the Mission Group reinsured Allstate.

The first category of agreements included approximately 26 reinsurance treaties (contracts) under which classes of business written by Mission Group affiliates were reinsured in part by Allstate, as well as several thousand facultative certificates under which a single risk written by a Mission Group company was reinsured in part by Allstate. (Declaration of David S. Brodnan filed herewith, ¶ 5.) Also included in this first category are a number of "retrocession" agreements under which the Mission Group assumed a portion of reinsurance provided by Allstate to other primary companies, *i.e.*, where Mission was effectively reinsuring Allstate. (*Id.*) All of the treaties, facultative certificates, and retrocession agreements provide for binding arbitration, except a few very early facultative certificates. (*Id.* ¶¶ 6-7)[1] As of March 1987, Allstate calculated that balances of approximately $7 million were due the Mission Group under these reinsurance agreements, including reserves. (*Id.*, ¶ 5.)

In the reinsurance agreements comprising the second category, Mission Insurance Co., one of the Mission Group companies, agreed to reinsure obligations of NESCO. Mission Insurance Co. and NESCO entered into approximately 41 reinsurance treaties, principally covering umbrella liability and excess liability business written by NESCO. (Brodnan Declaration, ¶ 2.) Allstate was also a party to at least two of these treaties. (*Id.*) In addition to this treaty business, NESCO and MIC entered into a number of faculative certificates under which a single

[1] If the Court orders arbitration under those reinsurance agreements containing arbitration provisions, Allstate would stipulate also to submit to arbitration any disputes arising under the relatively few, early contracts that did not contain such provisions.

risk written by NESCO was reinsured in part by MIC. (*Id.*) While some of the faculative certificates did not contain arbitration provisions, such clauses were included in each of the larger reinsurance treaties. (*Id.*, ¶ 3.) As of March 1987, Allstate calculated that it was owed approximately $13 million from the Mission Group under these reinsurance agreements. (*Id.*, ¶ 4.) The great majority of the sums due Allstate arise under the treaties between NESCO and the Mission Group, all of which contain arbitration provisions. (*Id.*) The balances due Allstate under agreements containing arbitration provisions are substantially more than the $7 million that Allstate calculates is due the Mission Group.

B. *Procedural History.*

On October 31, 1985, the Commissioner filed an application in Los Angeles Superior Court for an order appointing it conservator of Mission Insurance Co., alleging that this company had become insolvent. The Court appointed the Commissioner conservator on that date. Thereafter, the Commissioner was also appointed conservator of the other Mission Group affiliates on whose behalf this suit has been brought. When it became apparent that the assets of these Mission Group companies were insufficient to allow for their rehabilitation, the Commissioner's status was changed to that of liquidator and she began proceedings to liquidate the Mission Group affiliates named as plaintiffs in this case.

The Commissioner is in dispute with a large number of the Mission Group's reinsurers regarding reinsurance balances that are claimed by the Mission Group. In December 1986, the Commissioner filed suit in Los Angeles Superior Court against a number of these reinsurers. In December 1989, just before the three-year period for effecting service had run, the Commissioner attempted unsuccessfully to serve Allstate as a defendant in the Superior Court case. The Superior Court quashed service on Allstate, and the Commissioner thereafter filed the present

action. Only one of the other defendants in the present case, INA Reinsurance Corporation, has been served and appeared.

On August 31, 1990, Allstate removed this action to this Court on the grounds that the claims asserted against it are separate and independent from the claims asserted against other defendants, and that there is diversity between Allstate and the plaintiff. This is precisely the type of case for which the removal statute is designed. Without the right of removal, foreign reinsurers such as Allstate would face the prospect of litigating a politically charged case in state court where one of the parties is a state officer suing in her official capacity. Immediately upon removing the case to this Court, Allstate is moving to compel arbitration of its reinsurance disputes with Mission's liquidator, and otherwise to stay prosecution of this action as against Allstate.

III.

ARGUMENT: THE COURT SHOULD COMPEL ARBITRATION

A. *The Parties' Arbitration Agreements Unambiguously Require Arbitration Of This Dispute.*

In entering into the reinsurance treaties described above, Allstate and the Mission Group agreed to arbitrate any "differences arising between the contracting parties with reference to any transactions under this Agreement." (See Exhibit A to Brodnan Declaration, page 12.) With a handful of exceptions, similar or even broader provisions are included in each of the several thousand reinsurance agreements entered into by Allstate and Mission. (Brodnan Decl., ¶¶ 2, 3, 5-7 and Exhibits A-E thereto.) These provisions unambiguously require arbitration of all disputes, including Allstate's obligations to the Mission Group and Allstate's right to set off sums due Allstate from the Group.

1. *Both Federal And California Law Strongly Favor Arbitration And Require That Arbitration Agreements Be Broadly Construed.*

In its decision in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852 (1984), the United States Supreme Court ruled that the Federal Arbitration Act ("FAA") governs the issue of arbitrability of disputes under any agreement to arbitrate that affects interstate commerce.[2] Thus, the Supreme Court in *Southland* held that "the underlying issue of arbitrability" in such a case is "a question of substantive federal law." 465 U.S. at 12, 104 S.Ct. at 859. *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353 (1985) (in determining whether a dispute is subject to arbitration, the Court is to apply " 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [Federal Arbitration] Act' ") (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983)). Accordingly, federal law controls the issue of whether Allstate's claims to a setoff are subject to arbitration. As demonstrated below, however, the issue of which law controls here is essentially moot as both federal and California law require arbitration.

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[2] The reinsurance agreements at issue here are contracts "evidencing a transaction involving commerce" with section 2 of the FAA, 9 U.S.C. § 2. *See, e.g., Ainsworth v. Allstate Insurance Co.*, 634 F.Supp. 52, 55-56 (W.D. Mo. 1985) (reinsurance agreements were contracts "evidencing a transaction involving commerce" within the FAA). Indeed, as the *Ainsworth* court noted, "that the agreements involve insurance may be enough to establish the interstate commerce connection." *Id.* at 55. *Accord Bernstein v. Centaur Insurance Co.*, 606 F.Supp. 98, 101 (S.D.N.Y. 1984) ("insurance is business in interstate commerce" under FAA); *see also United States v. South Eastern Ass'n*, 322 U.S. 533, 539-53, 64 S.Ct. 1162, 1166-73 (1944) (fire insurance business is interstate commerce under Commerce Clause and Sherman Act).

The courts have consistently held that the strong policy favoring arbitration requires that agreements to arbitrate be broadly construed. The FAA, "both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and 'not substitute [its] own views of economy and efficiency' for those of Congress." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 1241 (1985). In light of this policy:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1353 (1960). As the Supreme Court more recently observed:

> 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. at 626, 105 S.Ct. at 3353-54 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 24-25, 103 S.Ct. at 941-42).

California decisions are fully in accord with the foregoing rules. *E.g., Bos Material Handling, Inc. v. Crown Controls Corp.*, 137 Cal.App.3d 99, 105, 186 Cal.Rptr. 740 (1982) ("In California, the general rule is that arbitration should be upheld unless it can be said with as-

surance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute").

Under the above standard, even tort claims—including intentional tort claims—must be arbitrated unless manifestly beyond the parties' arbitration agreement. *See, e.g., Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1986) (citing *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 406-07, 87 S.Ct. 1801 (1967)). Again the California decisions are in accord:

> In the particular situation [such as that here] where contracts provide arbitration for " 'any controversy . . . arising out of or relating to the contract . . .' " the courts have held such arbitration agreements sufficiently broad to include tort, as well as contractual, liabilities so long as the tort claims "have their roots in the relationship between the parties which was created by the contract."

Bos Material Handling, Inc. v. Crown Controls Corp., 137 Cal.App.3d at 105 (quoting *Berman v. Dean Witter & Co.*, 44 Cal.App.3d 999, 1003, 119 Cal.Rptr. 130 (1975)); *accord Tate v. Saratoga Savings & Loan Ass'n*, 216 Cal.App.3d 843, 855, 265 Cal.Rptr. 440 (1989). Likewise, statutory claims, such as claims under the Racketeer Influenced and Corrupt Organization Act (RICO) and the federal securities laws, must be submitted to arbitration when they fall within the scope of a contractual agreement to arbitrate, unless Congress has expressly created an exception to the Federal Arbitration Act. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (ordering arbitration of claims under Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332 (1987) (compelling arbitration of RICO claims and claims under Securities Exchange Act of 1934).

2. ***Under The Foregoing Standard, The Dispute Presented Here Is Within The Scope Of The Parties' Agreements To Arbitrate.***

There can be no dispute whether the claims asserted in this case fall within the scope of the parties' arbitration agreements. The Commissioner seeks to recover reinsurance balances that have accrued under reinsurance agreements pursuant to which Allstate reinsured members of the Mission Group. Allstate seeks to set off balances that are due it under other reinsurance agreements pursuant to which Mission acted as Allstate's reinsurer. These claims lie at the very heart of the contracts of reinsurance at issue in this case. It is difficult to imagine a clearer instance of a dispute concerning rights under the reinsurance agreements. Although citation of authority is hardly necessary, the cases have found that such disputes fall within the scope of arbitration agreements akin to those here. *E.g., Ainsworth v. Allstate Insurance Co.*, 634 F. Supp. 52, 53-56 (W.D. Mo. 1985) (receiver of insolvent insurers must arbitrate claim against reinsurer in view of arbitration agreements contained in reinsurance treaties); *cf. Market Insurance Corp. v. Integrity Insurance Co.*, 188 Cal.App.3d 1095, 233 Cal.Rptr. 751 (1987) (holding that arbitration clause in two general agency agreements applies to an insurance agent's action against an insurance company to collect commissions under the contracts).

For the foregoing reasons, the Court should compel arbitration of all claims asserted in this action as between the Commissioner and Allstate, unless the Commissioner somehow is not bound by the Mission Group's agreement to submit this dispute to binding arbitration. For the reasons set forth in the following section of this memorandum, the Commissioner cannot avoid the Mission Group's express agreement to arbitrate this dispute, and arbitration accordingly should be ordered.

B. *Mission's Agreement To Arbitrate Is Fully Binding On The Commissioner.*

Under both federal and California law, the Commissioner is subject to the arbitration agreements contained in the reinsurance agreements between Allstate and the Mission Group.

Ainsworth v. Allstate Insurance Co., 634 F.Supp. 52 (W.D. Mo. 1985), discussed above, addressed this precise issue on facts closely similar to those of the present case. In *Ainsworth*, the Director of the Missouri Division of Insurance, as domiciliary receiver of two insolvent Missouri insurance companies, brought an action "to recover payment of reinsurance funds allegedly due under written contracts between the insolvent insurers and defendant." 634 F.Supp. at 53. Those contracts each contained an arbitration provision providing that "[s]hould any difference of opinion arise between the Reinsurer and the Company which cannot be resolved in the normal course of business with respect to the interpretations of this Agreement or the performance of the respective obligations of the parties under this Agreement, the difference shall be submitted to arbitration." *Id.* Finding that the Federal Arbitration Act governed the arbitrability of the dispute, the federal court had no hesitation in concluding that the matter had to be submitted to contractual arbitration. *Id.* at 57. *See also Piffath v. District 1199, National Union of Hospital Health Care Employees*, 98 L.R.R.M. 2606 (E.D.N.Y. 1978) (commissioner appointed as liquidator of nursing home is bound by nursing home owner's arbitration agreement with union representing home's employees).

Just a few weeks ago, the Ohio Court of Appeals reached precisely this conclusion in *Fabe v. Columbus Insurance Co.*, No. 89AP-869, 1990 Ohio App. LEXIS 2650 (June 26, 1990), a copy of which is attached hereto as Exhibit A. There, the Ohio Superintendent of Insurance, as liquidator of Columbus Insurance Co.

(CIC), was seeking to recover approximately $500,000 under reinsurance agreements issued by two reinsurers. The reinsurers moved to compel arbitration under arbitation agreements virtually identical to those contained in the reinsurance agreements between Allstate and the Mission Group. The trial court granted the motion, and the Superintendent appealed. The Ohio Court of Appeals affirmed:

> The dispute which defendants seek to have resolved by arbitration in this case will not affect the priority of claims of creditors of CIC. Rather, plaintiff, as liquidator, brought . . . an action against defendants to recover money allegedly owed to CIC. While it is true that the resolution of the dispute will have an impact on the amount of money plaintiff has to pay the creditors of CIC, arbitration of that dispute will not adversely affect any party to the liquidation proceeding.

Id.

Another Court reached the same conclusion in *Universal Marine Insurance Co., Ltd. v. Beacon Insurance Co.*, 592 F.Supp. 948 (W.D.N.C. 1984). There the Court had ordered arbitration of a lawsuit against two insurers. After this order was entered, one of the insurers, Cherokee Insurance Co., was declared insolvent and a conservator for it was appointed. Cherokee moved to stay the arbitration, arguing that the District Court should abstain from asserting jurisdiction, in view of the pendency of state court insolvency proceedings, and accordingly should vacate the order compelling arbitration. The District Court denied the motion, rejecting the suggestion that the pendency of the state court insolvency proceedings required that the federal court abstain from the action or otherwise reconsider its order compelling arbitration. 592 F.Supp. at 954-55.

The foregoing decisions are consistent with the status of the Insurance Commissioner under the California In-

surance Code. As several California decisions have recognized, the Insurance Commisioner, when acting as a conservator or liquidator of an insolvent insurance company, has duties in the nature of a receiver. *E.g., Caminetti v. Pacific Mutual Life Insurance Co.*, 22 Cal.2d 344, 354, 139 P.2d 908, *cert. denied*, 320 U.S. 802 (1943); *Anderson v. Great Republic Life Insurance Co.*, 41 Cal.App.2d 181, 106 P.2d 75 (1940). It has long been the law that "[a] receiver sues only on a cause of action of the parties or estate represented, and is subject to the same defenses which would have been available against them." 4 B. Witkin, California Procedure, *Pleading* § 127 at 160 (1985); *see also Allen v. Ramsay*, 179 Cal.App.2d 843, 854, 4 Cal.Rptr. 575 (1960) ("A receiver occupies no better position than that which was occupied by the person or party for whom he acts and the receiver takes the property and the rights of one for whom he was appointed in the same condition and subject to the same equities as existed before his appointment and any defense good against the original party is good against the receiver"). Thus, the Commisisoner's power to avoid enforcement of an arbitration agreement can be no greater than that of Mission, in whose shoes she must stand.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, does not lead to a contrary result. The McCarran-Ferguson Act provides in relevant part that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The Ninth Circuit, however, has expressly held that the McCarran-Ferguson Act is inapplicable to state insurance liquidation statutes. *State of Idaho ex rel. Soward v. United States*, 858 F.2d 445, 452-53 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 2062 (1989). There the Ninth Circuit held:

> Once rendered insolvent and placed in the hands of a liquidator, an insurance company no longer is involved in risk protection . . . In such a situation, the state is no longer regulating the traditional business of insurance, and thus, has exceeded the boundaries within which the McCarran-Ferguson Act frees it from preemption by general federal statutes.

858 F.2d at 452. *Accord Gordon v. United States*, 846 F.2d 272, 273 (4th Cir.) (per curiam), *cert. denied*, 488 U.S. 954 (1988) ("the liquidation of an insolvent insurance company and the determination of the priority of payment of claims against the insolvent do not constitute the 'business of insurance' within the meaning of the McCarran-Ferguson Act").

Moreover, while the *Soward* case is dispositive of the issue, several decisions have specifically held that the McCarran-Ferguson Act does not limit application of the FAA or otherwise prevent an order compelling arbitration of insurance disputes. *E.g., Miller v. National Fidelity Life Insurance Co.*, 588 F.2d 185, 187 (5th Cir. 1979) ("the McCarran-Ferguson Act does not bar application of the Federal Arbitration Act to insurance contracts"); *Hart v. Orion Insurance Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971) ("the McCarran-Ferguson Act does not bar the application of the Federal Arbitration Act" to a suit for payment of benefits under disability policy); *Hamilton Life Insurance Co. v. Republic National Life Insurance Co.*, 408 F.2d 606, 611 (2d Cir. 1969) (same).

Indeed, several decisions have specifically held that the McCarran-Ferguson Act is no bar to an order under the FAA directing the arbitration of claims by an insolvent insurer against its reinsurers—the precise context presented here. *E.g., Ainsworth v. Allstate Insurance Co.*, 634 F.Supp. 52, 56-57 (W.D. Mo. 1985) (ordering arbitration of suit by Director of Missouri Division of Insurance notwithstanding Missouri's "comprehensive scheme

to wind up the affairs of an insolvent insurance company," since the Missouri liquidation statute did not expressly exclude arbitration); *cf. Bernstein v. Centaur Insurance Co.*, 606 F.Supp. 98, 101-02 (S.D.N.Y. 1984) ("[I]f New York has a law that *specifically prohibits* arbitration in disputes involving the insurance business, arbitration may be precluded"; otherwise, the FAA mandates arbitration notwithstanding the McCarran-Ferguson Act (emphasis supplied).[3]

C. *Arbitration Of Reinsurance Disputes Is Particularly Appropriate.*

That the present dispute concerns rights and obligations under reinsurance agreements makes arbitration particularly suitable. More than twenty years ago it was observed that "[i]t is the general practice and practically the uniform custom to provide in a [reinsurance] treaty for the arbitration of disputes arising out of the terms of the treaty." K. Thompson, *Reinsurance* (4th ed. 1966) at 140. The federal courts, moreover, have routinely and repeatedly compelled arbitration of reinsurance disputes arising under such arbitration agreements. For instance,

[3] A handful of decisions rendered by the Southern District of New York reached a contrary result. *E.g., Washburn v. Corcoran*, 643 F.Supp. 554 (S.D.N.Y. 1986). These cases, of course, are flatly inconsistent with the Ninth Circuit's decision in *Soward*, and therefore cannot be dispositive here. The Southern District of New York decisions are distinguishable in any event. The cases rely on the New York Court of Appeals' ruling in *Knickerbocker Agency v. Hotz*, 4 N.Y.2d 245, 173 N.Y.S.2d 602, 149 N.E.2d 885 (1958), which construed the New York liquidation statute to invalidate arbitration provisions as against an insolvent insurer's liquidator. *E.g., Washburn v. Corcoran*, 643 F.Supp. at 557 ("As the highest court of New York has ruled that arbitration is incompatible with the commands of [the liquidation statute], it necessarily follows that enforcement of a federal statute requiring arbitration would defeat this provision of the state statute"). In contrast, no California court has considered the issue of whether arbitration is consistent with the California liquidation statute, much less held that it is not.

in *Houston General Insurance Co. v. Realex Group, N.V.*, 776 F.2d 514 (5th Cir. 1985), the Court of Appeals reversed a District Court order which had refused to compel arbitration under the FAA of a suit identical to that here: one brought by an insurer against its reinsurer seeking to recover balances due on a policy of reinsurance. 776 F.2d at 516-17. Indeed, the Ninth Circuit ordered arbitration of a reinsurance dispute as early as 1928 *Pacific Indemnity Co. v. Insurance Co. of North America*, 25 F.2d 930 (9th Cir. 1928).

The near-universality of arbitration agreements in the reinsurance industry has resulted from a number of factors. Among other things, arbitration offers a relatively prompt, expeditious method for determining the reinsurer's obligation, if any, to pay reinsurance balances in dispute. Also, resolution of reinsurance disputes involves both specialized terminology and a system of accounting that is unique to the insurance industry. Indeed, reinsurance disputes are so idiosyncratic that reinsurance arbitration agreements typically "require the arbitrators to be recognized authority in the field in which the case arises." K. Thompson, *Reinsurance*, at 140. Many of the arbitration agreements at issue here contain just such a provision, requiring that the "arbitrators shall be executive officers of insurance or reinsurance companies or an attorney specializing in insurance law." (See Exhibit A to Brodnan Declaration, page 12.)

Arbitration before reinsurance experts is appropriate for another reason: reinsurance treaties typically provide that the rights and duties thereunder will be determined by a business-oriented "honorable undertaking" standard, and not by legal standards applicable to other contract disputes. As Professor Thompson explains:

> It is the general provision that the reinsurance treaty shall be interpreted as an *honorable agreement* rather than a legal contract. The whole underlying purpose of the arbitration clause is to provide a means to

> solve difficulties in the way gentlemen in good faith work out their troubles without litigation.

K. Thompson, *Reinsurance* at 141 (emphasis in original). For obvious reasons, this standard is better carried into effect by a panel of industry experts than by a judicial trier of fact. Again, the arbitration agreements here typically contain such a provision, stating that the reinsurance contracts shall be interpreted "as an honorable engagement rather than a merely legal obligation." (See Exhibit A to Brodnan Declaration, page 12.)

Each of the foregoing reasons make arbitration particularly appropriate here. The determination of Allstate's and the Mission Group's conflicting claims would involve terminology and an accounting system that are unique to the reinsurance context. Accounting and actuarial issues will be particularly important here since the reinsurance balances asserted by Allstate and Mission consist largely of liabilities for losses projected years into the future. Those balances, arising under several thousand reinsurance agreements, total some $20 million. Judicial resolution of this dispute would put the parties to extraordinary burden and expense, not to mention the expenditure of this Court's resources.

For the foregoing reasons, the Court should compel arbitration of the claims asserted against Allstate in this action.[4]

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[4] Likewise, the Court should issue an order staying prosecution of this action as against Allstate. Such an order is appropriate, if not mandated, by section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, which provides that a court "shall" stay a civil action when it is ordered to arbitration. *See generally Thompson v. Zavin*, 607 F.Supp. 780, 782 (C.D. Cal. 1984).

IV.

CONCLUSION

As demonstrated above, both federal and California law guarantee Allstate's right to arbitrate its dispute with the Mission Group and the Commissioner. This Court should therefore compel Mission and the Commissioner to submit this dispute to arbitration, as the parties expressly agreed in the reinsurance agreements that are the subject of this action.

DATED: September 10, 1990

MUNGER, TOLLES & OLSON
MELVYN H. WALD
JOSEPH D. LEE

By /s/ Joseph D. Lee
JOSEPH D. LEE
Attorneys for Defendant
ALLSTATE INSURANCE COMPANY

[Exhibit A—*Fabe v. Columbus Ins. Co.*, 1990 Ohio App. Lexis 2650, omitted in printing.]

[Proof of Service omitted in printing.]

[Filed Sep. 10, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

DECLARATION OF DAVID S. BRODNAN IN SUPPORT OF MOTION OF ALLSTATE INSURANCE COMPANY TO COMPEL ARBITRATION AND STAY PROSECUTION

I, DAVID S. BRODNAN, declare and state:

1. I am employed by Allstate Insurance Company ("Allstate") as Assistant Vice President, Assistant Secretary, and Assistant General Counsel. I make this declaration based on my personal knowledge derived in part from review of Allstate's business records, which records were made and maintained in the ordinary course of Allstate's business, were made at the time of the transactions they reflect, and were made as a record of transactions that actually took place. If called as a witness, I could and would testify competently to the facts stated herein.

A. *The Mission Group As Allstate's Reinsurer.*

2. From on or about August 1974 to or about September 1982, Northbrook Excess and Surplus Insurance Company ("NESCO"), formerly a wholly-owned subsidiary of Allstate which was merged into Allstate in January 1985, was engaged in the business of writing excess and surplus types of risks in the State of California and elsewhere. (Initially, NESCO wrote business under the name

"Northbrook Insurance Co."; this name was changed to NESCO in 1978.) NESCO entered into approximately 41 treaties of reinsurance with Mission Insurance Co. ("MIC"), a member of the Mission Group of Insurance Companies ("the Mission Group"). Under the NESCO-MIC treaties, MIC agreed to reinsure certain risks written by NESCO, principally in the areas of umbrella liability and excess liability. Allstate Insurance Company was also a party to at least 2 of the 41 treaties, as a ceding insurer. In addition to this treaty business, NESCO and MIC entered into a number of facultative certificates, under which a single risk written by NESCO was reinsured in part by MIC.

3. While at least some of the facultative certificates entered into between NESCO and the Mission Group did not contain arbitration provisions, each of the reinsurance treaties between these companies which is in Allstate's possession contains such a clause, providing that any disputes arising under the treaty shall be submitted to binding, non-judicial arbitration. Under Allstate's normal procedures, such a provision would be included in all of the treaties. A true and correct copy of a sample reinsurance treaty between NESCO and MIC is attached hereto as Exhibit A. Many of the arbitration agreements in the NESCO-Mission treaties are identical to the provision set forth at pages 7-8 of the treaty attached as Exhibit A hereto, though other arbitration provisions vary in certain respects. Attached hereto as Exhibit B are true and correct copies of exemplars of each of the arbitration clauses contained in the reinsurance treaties between NESCO and MIC that are in Allstate's possession.

4. As of March 1987, Allstate calculated that a balance of roughly $13 million was due Allstate on the business reinsured by MIC, including outstanding reserves and reserves for incurred but not reported claims ("IBNR"). The great majority of the sums due Allstate arise under the treaties between NESCO and the Mission Group, as

opposed to the facultative business transacted between these companies.

B. *Allstate As The Mission Group's Reinsurer.*

5. Beginning in 1961 and continuing through 1985, Allstate agreed to reinsure four of the Mission Group companies on whose behalf the present lawsuit has been filed: MIC, Mission National Insurance Co., Enterprise Insurance Co., and Holland-America Insurance Co. Allstate and one or more of the Mission Group companies entered into approximately 26 reinsurance treaties under which classes of business written by the Mission Group were reinsured in part by Allstate. The agreements also include several thousand facultative certificates under which a single risk written by a Mission Group company was reinsured in part by Allstate. Finally, these agreements include a number of "retrocession" agreements by which a Mission Group company assumed a portion of reinsurance provided by Allstate to other primary companies. As of March 1987, Allstate calculated that the total net balance due the Mission Group under these agreements was roughly $7 million, including outstanding reserves and reserves for IBNR.

6. Each of these reinsurance treaties that Allstate has been able to locate (more than 35 in number) contain an arbitration provision. Under Allstate's normal procedures, such a provision would be included in all such agreements. A true and correct copy of a representative treaty pursuant to which Allstate reinsured Mission is attached hereto as Exhibit C. Attached hereto as Exhibit D are true and correct copies of exemplars of each of the other arbitration clauses contained in the reinsurance treaties described in the preceding paragraph that Allstate has been able to locate. As with the NESCO-MIC treaties, the arbitration provisions attached as Exhibits C and D are largely but not completely identical to one another.

7. To the best of my knowledge and belief, each of the facultative certificates between Allstate and the Mission Group, with the exception of a few very early certificates, also contained an arbitration provision. Attached hereto as Exhibit E is a representative sample of such an arbitration provision. Under Allstate's normal procedures, such provisions would have been included in all of the certificates pursuant to which Allstate agreed to reinsure the Mission Group, excepting only the very early certificates.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of September, 1990 at South Barrington, Illinois.

/s/ David S. Brodnan
DAVID S. BRODNAN

EXHIBIT A

CASUALTY QUOTA SHARE AGREEMENT

between

NORTHBROOK INSURANCE COMPANY
Northbrook, Illinois

(hereinafter called "Company")

and the

COMPANIES SPECIFIED IN THE INTERESTS AND LIABILITIES AGREEMENTS ATTACHED HERETO

(hereinafter called "Reinsurer")

ARTICLE I

BUSINESS COVERED

The Company shall issue policies, contracts, binders, slips, and/or other evidence of insurance or reinsurance (hereinafter referred to as "policies") covering Umbrella Liability and/or Excess General Liability Business; and the Reinsurer agrees to reinsure such policies of the Company in accordance with the following terms and conditions.

ARTICLE II

TERRITORY

This Agreement shall apply wherever the Company's policies apply.

ARTICLE III

RETENTION AND LIMIT

The Company agrees to cede and the Reinsurer agrees to accept under the Agreement a sixty-five per cent (65%) pro rata proportion of each of the Company's

policies as defined in Article I. The Company will keep a thirty-five per cent (35%) pro rata proportion of each of the policies for its own account.

As respects policies reinsured under this Agreement, it is understood and agreed that:

1.) The maximum limits subject to this Agreement shall be deemed not to exceed:

   a) $5,000,000 each occurrence;

   b) $5,000,000 in the aggregate, each annual period as respects Products Liability;

   c) $5,000,000 in the aggregate, each annual period as respects Occupational Disease.

2.) All policies written shall be excess of:

   a) At least $100,000 each person, $300,000 each occurrence for Automobile Bodily Injury exposure and $300,000 each person, $300,000 each occurrence for General Liability Bodily Injury exposure;

   b) At least $100,000 each occurrence, and in the aggregate annually, for Property Damage exexposures;

   c) At least $10,000 for self-insured perils;

   d) Underlying limits specified in the policies for all other perils.

3.) In the event of the original umbrella limit being less than $5,000,000 the Company will determine that higher limits will not be purchased in any other market unless the Company's quotation to the original Insured is unacceptable.

4.) Coverage may be extended under umbrellas to include Specific Workmen's Excess Compensation, but only excess of $100,000.

5.) No individual policy shall be written for a period greater than thirty-six (36) months plus odd time, which in no event shall exceed forty-two (42) months in all, unless otherwise mutually agreed.

6.) Policies shall be issued using the equivalent of the "LONDON 1971" or "LRD May 60" forms, or other forms as may be mutually agreed, but including defense and/or self-insured perils.

7.) Each individual policy shall contain the appropriate Nuclear Incident Exclusion Clause and Radioactive Contamination Exclusion Clause, the equivalent of N.M.A. 1477.

ARTICLE IV

EXCLUSIONS

This Agreement shall not apply to, but specifically excludes policies issued in respect of:

1.) Railroads.

2.) Contractors involved in tunneling under pressure, blasting on construction of dams or bridges.

3.) Governmental bodies where coverage is required for airport operations, or utilities, other than waterworks.

4.) Pharmaceutical manufacturers and/or distributors.

5.) Utilities other than wholesalers.

6.) Oil Risks other than well owners, lease operators, well services, and oil and/or gas well drilling contractors, unless specifically accepted by the Reinsurer.

7.) Chemical manufacturing.

8.) All errors and omissions liability or malpractice except hospital malpractice with minimum underlying limits of $200/600.

9.) Aviation risks.

10.) Manufacture of aircraft products.

11.) Directors and officers liability.

12.) Kidnap and ransom.

13.) S.E.C. liability.

14.) Fidelity and surety.

15.) Business written and classified as ocean marine.

16.) Business eminating from the R.L. Jarrett Agency.

17.) Credit life insurance.

18.) Insolvency and Financial guarantee.

19.) Assumed reinsurance.

20.) Risks of war, bombardment, invasion, insurrection, rebellion, revolution, military or usurped power or confiscation by order of any government or public authority, as excluded under a standard policy containing a standard war exclusion clause.

If the insured's main operations are not excluded hereunder, exclusions 1 through 8 shall not apply provided such operations or perils are incidental to the insured's main operations. The Company shall be the sole judge of the meaning of the word "incidental".

ARTICLE V

ORIGINAL CONDITIONS

All reinsurances for which the Reinsurer shall be liable by virtue of this Agreement shall be subject in all respects to the same terms, rates, conditions, interpretations, and waivers and to the same modifications, alterations and cancellations as the respective policies, binders, contracts or agreements of the Company to which such reinsurance relate, it being the intention of this Agreement that the Reinsurer is to follow the fortunes of the Company.

ARTICLE VI

TERM AND CANCELLATION

This Agreement shall be effective at 12:01 a.m. September 1, 1974 and shall apply to risks bound by the Company with inception or renewal dates occurring subsequent to 12:01 a.m. September 1, 1974.

Further, this Agreement shall remain in effect for an indefinite period, but may be terminated by either party giving at least thirty (30) days previous notice by registered letter, such cancellation to become effective at any September 1. The Reinsurers shall participate in all policies coming within the terms of this Agreement having an effective or renewal date during the thirty (30) days aforesaid and shall remain liable until the natural expiration of these policies and all other policies attaching during the period of the Agreement for their share of losses arising out of all policies in force at the expiration of the said thirty (30) days notice, but not to exceed one year, unless otherwise agreed upon. At the end of the one year, or mutually agreed upon period, the unearned premiums, if any, less commission is to be returned to the Company by the Reinsurer.

Except as otherwise provided herein this Agreement shall be ipso facto cancelled in the event of insolvency, liquidation or change of majority financial control of either party, except that the surviving party reserves the right to waive such cancellations after it has been fully informed as to the circumstances of such insolvency, liquidation or change of majority financial control. If such surviving party then elects to waive the cancellation, this Agreement shall be reinstated by written notice, of the same to the other party, stating when such reinstatement is effective. Notwithstanding the foregoing, the Reinsurers shall participate in all policies coming within the terms of this Agreement at the time of such cancellation and shall remain liable until the natural expiration of all

policies attaching during the period of this Agreement, but not exceeding one year, unless otherwise agreed upon.

ARTICLE VII

DEFINITION OF OCCURRENCE

The term "occurrence" shall mean any one occurrence, or series of occurrences arising out of one event and/or caused by accumulative or continuous operations at one specific site which cannot be attributed to any single event, and/or proceeding from the use or consumption of one prepared or acquired lot of merchandise or product, or as defined in the original insurance.

The term "aggregate" shall mean ultimate net loss incurred in the aggregate during any one polic year.

ARTICLE VIII

LOSSES

All loss settlements made by the Company provided same are within the conditions of the original policies and within the terms of this Agreement, shall be unconditionally binding upon the Reinsurers.

Reinsurers shall be liable for their proportionate share of all expenses incurred by the Company in connection with the investigation and settlement of losses or alleged losses (but excluding salaries of employees or of officials of the Company and also excluding any allowances for internal office expenses) and shall participate pro rata to their respective interest in any sums which may be recovered by the Company, whether as salvage or otherwise.

The Company will adhere to the following Claims Procedure:

1.) Immediate advice shall be given by the Company of any loss likely to involve an original policy, such advice to be submitted by mail immediately with copies of all relevant information.

2.) If a loss is likely to involve the original policy, an attorney must be appointed depending upon the location of the loss or where the litigation is likely to take place.

3.) As soon as the attorney's reports are received, they are to be submitted by mail for information purposes.

The Reinsurer shall share proportionately in any salvage or any other recovery (after expenses) that may be received by the Company applicable to any loss under this Agreement.

Should the Company become legally obligated to pay a loss in excess of its policy limits, the Reinsurer agrees to assume seventy-five per cent (75%) of that part of such loss plus proportionate loss expense which is in excess of the policy limit, such loss in excess of the limit having been incurred because of failure to settle within the policy limit or by reason of alleged or actual negligence, fraud or bad faith in rejecting an offer of settlement or in the preparation of the defense, or in the trial of any action against its Insured or in the preparation or prosecution of an appeal consequent upon such action. In no event, however, shall the liability of the Reinsurer respecting any such loss exceed the limits of liability of this Agreement as set forth in Article III.

ARTICLE IX

PREMIUM

The premium payable to the Reinsurer by the Company shall be their proportionate share of the original net premiums received by the Company in respect of business covered hereunder, less ten per cent (10%).

"Original net premiums" as used in this Article shall be understood to mean original gross premiums, less acquisition costs, and less Federal Excise Tax, if applicable. It is further understood that total acquisition costs of the

Company in respect of all policies covered hereunder shall not exceed twenty-two and one-half per cent (22.5%).

ARTICLE X

ACCOUNTS AND STATISTICS

Within forty-five (45) days following the close of each month the Company shall provide a Statement of Account, which Statement shall include a premium closing bordereau with respect to each policy closed, and a bordereau of claims paid during the month, as well as a bordereau of outstanding claims.

Payment of the balance due shall be made by the debter party within forty-five (45) days after the account has been rendered.

The Company retains the right, however, to request special settlement of any claim hereunder, and the Reinsurer shall make such payment within seven (7) days of receipt of appropriate proof of loss. Any such special settlements will not appear on the monthly "Claims Paid Bordereau".

The following paragraph not applicable where not required to avoid statutory penalty.

It is further agreed that the Reinsurer will provide letters of credit in favor of the Company for the Reinsurer's share of the outstanding losses and loss expenses issued by a U.S. Bank a member of the Federal Reserve System and such letters of credit to be adjusted quarterly.

ARTICLE XI

CURRENCY

All accounts shall be rendered and settled in U.S. Dollars.

ARTICLE XII

ERRORS AND OMISSIONS

It is mutually agreed that neither the Company's nor the Reinsurer's interests shall be prejudiced by inadvertent errors or omissions which may occur in the application or use of this agreement, and upon discovery of any such errors or omissions, prompt rectification shall be made.

ARTICLE XIII

TAXES

In consideration of the terms under which this Agreement is issued, the Company agrees not to claim any deduction in respect of the premium hereon when making tax returns, other than income or profits tax returns, to any State or Territory or the District of Columbia.

ARTICLE XIV

FEDERAL EXCISE TAX (applicable to certain Reinsurers not domiciled in the United States of America)

Notice is hereby given that the Reinsurer has agreed to allow for the purpose of paying Federal Excise Tax one per cent (1%) of the premium payable hereon to the extent such premium is subject to Federal Excise Tax.

It is understood and agreed that in the event of any return of premium becoming due hereunder the Reinsurer will deduct one per cent (1%) from the amount of the return and the Company shall take steps to recover the Tax from the United States Government.

ARTICLE XV

ARBITRATION

In the event of differences arising between the contracting parties with reference to any transactions under this Agreement, such differences must be submitted to arbitration upon the request of one of the contracting parties.

Each of the contracting parties shall nominate an arbitrator within thirty (30) days of being requested to do so, and the two named shall select an umpire before entering upon the arbitration. In the event that either party fails to appoint its arbitrator within the time specified, the other party shall have the right to appoint the said arbitrator forthwith. The said arbitrators and umpire shall be executive officers of insurance or reinsurance companies or insurance brokers or an attorney specializing in insurance law, not under the control or management of either party to this Agreement.

If the arbitrators do not agree as to an umpire within thirty (30) days of their appointment, each of them shall name three, of whom the other shall decline two, and the decision shall be made by drawing lots. Each party shall submit its case to its arbitrator within fifteen (15) days of the appointment of the umpire or within such period as may be agreed by the Board of Arbitration.

A decision in writing of any two of the three (two arbitrators and one umpire), when filed with the contracting parties, shall be binding upon both. The arbitrators and the umpire are relieved from all judicial formalities and may abstain from the strict rules of law, interpreting the present Agreement as an honorable engagement rather than a merely legal obligation.

Each party shall pay the fee of its own arbitrator and half of the fee of the umpire, and the remaining costs of the arbitration shall be paid as the award shall direct.

Any arbitration shall take place in Northbrook, Illinois unless otherwise agreed.

ARTICLE XVI

INSOLVENCY

In the event of the insolvency of the Company, this reinsurance shall be payable directly to the Company, or to its liquidator, receiver, conservator or statutory suc-

cessor on the basis of the liability of the Company without diminution because of the insolvency of the Company or because the liquidator, receiver, conservator or statutory successor of the Company has failed to pay all or a portion of any claim.

It is agreed, however, that the liquidator, receiver, conservator or statutory successor of the Company shall give written notice to the Reinsurers of the pendency of a claim against the Company indicating the policy or bond reinsured which claim would involve a possible liability on the part of the Reinsurers within a reasonable time after such claim is filed in the conservation or liquidation proceeding or in the receivership, and that during the pendency of such claim, the Reinsurers may investigate such claim and interpose, at their own expense, in the proceeding where such claim is to be adjudicated any defense or defenses that they may deem available to the Company or its liquidator, receiver, conservator or statutory successor. The expense thus incurred by the Reinsurers shall be chargeable, subject to the approval of the court, against the Company as part of the expense of conservation or liquidation to the extent of a pro rata share of the benefit which may accrue to the Company solely as a result of the defense undertaken by the Reinsurers.

ARTICLE XVII

ACCESS TO RECORDS

The Reinsurers or their duly authorized representatives may examine at all reasonable times at the office of the Company the books, records and papers pertaining to the risks reinsured hereunder; but it is understood and agreed that the business of the Company in which the Reinsurers have a reinsurance interest hereunder is the sole and absolute property of the Company and the Reinsurers agree not to use any information so acquired for any purpose other than that as contemplated herein.

[Exhibits B, C, D and E Omitted in Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

SUPPLEMENTAL NOTICE OF REMOVAL OF CIVIL ACTION AND STATEMENT OF ADDITIONAL GROUNDS FOR REMOVAL AND JURISDICTION

TO THE PARTIES HERETO AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Allstate Insurance Company ("Allstate") and Defendant Insurance Company of North America ("INA") hereby file this Supplemental Notice of Removal of Civil Action and Statement of Additional Grounds for Removal and Jurisdiction, specifying grounds for the removal of this action and for this Court's exercise of jurisdiction over this action, in addition to the grounds stated in Allstate's Notice of Removal of Civil Action filed herein on August 31, 1990. These additional grounds for removal are as follows:

1. Allstate and INA are named as defendants in a civil action filed in the Superior Court for the State of California for the County of Los Angeles, Case No. C 751868, entitled *Roxani Gillespie, Insurance Commissioner of the State of California, in her capacity as liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Mission Reinsurance Corporation, Holland-America Insurance Company vs. Allstate Insurance Company; AGF Reinsurance Corp.; American Union Insurance Co. of New York; Atlas Assurance Company of America; Employers Mutual*

Liability Insurance Corp.; Harbor Insurance Co.; INA Reinsurance Company; Insurance Company of North America; Lincoln National Reinsurance Co.; New England Reinsurance Corp.; North American Co. for Property and Casualty; Northwestern National Insurance Co.; Phoenix Assurance Company of New York; R.L.I. Insurance; Security Mutual Casualty Co.; Transatlantic Reinsurance Co.; Trinity Universal Insurance Co.; U.S. Fidelity & Guaranty Co.; Victory Reinsurance Co. of America; Zenith Insurance Company; and Does 1 thru 1000, inclusive, which action was timely removed to this Court by Allstate pursuant to 28 U.S.C. § 1441(c) on August 31, 1990.

2. At the time Allstate initially removed this action, there was not complete diversity between the parties. Subsequently, on or about January 25, 1991, plaintiff Insurance Commissioner of the State of California filed in the Superior Court of the State of California for the County of Los Angeles the Request for Dismissal attached hereto as Exhiibt A, indicating an intent to dismiss the defendants specified therein ("the Dismissed Defendants"). The Dismissed Defendants include all defendants that are not of citizenship diverse from that of the plaintiff Insurance Commissioner. On February 8, 1991, Allstate and INA filed with this Court the Notice of and Stipulation to Plaintiff's Dismissal of Certain Named Defendants, a true and correct copy of which is attached hereto as Exhibit B, effecting the dismissal of the Dismissed Defendants from this action.

3. As a consequence of the dismissal of the Dismissed Defendants, there is complete diversity between plaintiff, a citizen of the State of California, and the remaining defendants, Allstate, INA, Employers Insurance of Wausau a Mutual Company (sued herein under its former name, Employers Mutual Liability Corp.), Transatlantic Reinsurance Co., and Victory Reinsurance Company of America (collectively "the Remaining Defendants") because, at the time of commencement of this action and at all

times thereafter, Allstate Insurance Company was and is a corporation incorporated under the laws of the State of Illinois, with its principal place of busines in Illinois; defendant INA was and is a corporation incorporated under the laws of the Commonwealth of Pennsylvania with its principal place of business in Pennsylvania; defendant Employers Insurance of Wausau a Mutual Company (sued herein under its former name, Employers Mutual Liability Corp.) was and is a corporation incorporated under the laws of the State of Wisconsin with its principal place of business in Wisconsin; defendant Transatlantic Reinsurance Co. was and is a corporation incorporated under the laws of the State of New York with its principal place of business in New York; and defendant Victory Reinsurance Company of America was and is a corporation incorporated under the laws of the State of Delaware with its principal place of business in Delaware.

4. Although fictitiously-designated Defendants Does 1 through 1000 are referred to in the Complaint, such fictitiously-designated defendants are to be disregarded for purposes of diversity pursuant to 28 U.S.C. § 1441(c).

5. The matter in controversy herein exceeds the sum of $50,000, exclusive of interest and costs, as to each Remaining Defendant. For this reason and those alleged hereinabove, and in addition to the grounds for jurisdiction and removal specified in Allstate's August 31, 1990 Notice of Removal, this action is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1332 (a)(2), and which Allstate and INA are and would be entitled to remove under 28 U.S.C. § 1441(a).

6. In the alternative, and in addition to the grounds specified in Allstate's August 31, 1990 Notice of Removal, this action is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1332(a)(2), and which Allstate and INA are and would be entitled to remove under 28 U.S.C. § 1441(a), in that each originally-named defendant herein that is not of citizenship

diverse from plaintiff (insofar as any such non-diverse defendant remains a party as of the date of filing this Supplemental Notice) is a sham and merely nominal defendant who should be disregarded in determining whether there is complete diversity for jurisdictional and removal purposes, and in that the matter in controversy herein exceeds the sum of $50,000, exclusive of interest and costs, as to each defendant that should not be so disregarded.

7. Allstate and INA file and serve this Supplemental Notice within one year of the filing of the above-referenced Superior Court action and within 30 days of Allstate's receipt and of INA's receipt of the pleadings from which it could first be ascertained that the case is one that would be removable on the grounds specified herein. This Supplemental Notice is therefore timely.

8. Allstate and INA are informed and believe and on that basis allege that the other Remaining Defendants (Employers Insurance Company of Wausau a Mutual Company, Transatlantic Reinsurance Co., and Victory Reinsurance Co.) have not been served with or received a copy of the Commissioner's complaint herein and have not appeared in this action. Allstate and INA accordingly submit that such defendants need not join in this Supplemental Notice of Removal. *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1429-30 (9th Cir. 1984).

9. Allstate's August 31, 1991 Notice of Removal attached all process, pleadings, and orders properly served upon Allstate and INA in the above-referenced Superior Court action.

WHEREFORE, Allstate and INA hereby specify the facts recited above as additional grounds for the removal of the above-referenced Superior Court action to this United States District Court and for this Court's exercise of jurisdiction over this action.

DATED: February 8, 1991

MUNGER, TOLLES & OLSON
MELVYN H. WALD
JOSEPH D. LEE

By /s/ Joseph D. Lee
JOSEPH D. LEE

Attorneys for Defendant
ALLSTATE INSURANCE COMPANY

DATED: February 8, 1991

MAYER, BROWN & PLATT
NEIL M. SOLTMAN
ROBERT L. WALDMAN

By /s/ Robert L. Waldman
ROBERT L. WALDMAN

Attorneys for Defendant
INSURANCE COMPANY OF
NORTH AMERICA

[Exhibits A and B Omitted in Printing]

[Proof of Service omitted in printing]

No. 91-55855

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, MISSION REINSURANCE CORPORATION TRUST and HOLLAND-AMERICA INSURANCE COMPANY TRUST,

Plaintiff-Appellee,

v.

ALLSTATE INSURANCE COMPANY, *et al.*,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

KARL L. RUBINSTEIN
DANA C. BROOKS
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Attorneys for Appellee Insurance Commissioner

I. INTRODUCTION AND STATEMENT OF COUNSEL

The Insurance Commissioner of the State of California, in his capacity as Liquidator and Trustee of the Mission Insurance Company Trust, Mission National Insurance Company Trust, Enterprise Insurance Company Trust, Holland-America Insurance Company Trust and Mission Reinsurance Company Trust (the "Mission Companies") (the "Commissioner"), Appellee in *Insurance Commissioner, et al. v. Allstate Insurance Company, et al.*, No. 91-55855, seeks rehearing *en banc* of the February 2, 1995 Panel Decision (the "Decision") (Fletcher, J., Pregerson, J., and Norris, J.) (the "Panel"). On July 3, 1991, the U.S. District Court for the Central District of the State of California (the "district court") entered is Order granting the Commissioner's Motion to Remand. Allstate appealed that Order. The Panel held that (1) review of the remand order in this case is not barred by 28 U.S.C. Section 1447(d); (2) the remand order based on abstention was a final collateral order that was reviewable on appeal; and (3) a district court may not abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) ("*Burford*") when the plaintiff seeks only legal relief.

The Commissioner seeks rehearing *en banc* of the issues numbered 2 and 3 identified above. In the judgment of counsel, rehearing *en banc* is required because the Panel's Decision overlooks the fact that this is an equitable action involving equitable proceedings with a counterclaim brought in equity, and directly conflicts with decisions of the Federal Circuit Courts relied upon in the Decision, as well as decisions of the United States Supreme Court on issues of exceptional importance. The Panel's Decision, if allowed to stand, will interfere with substantial state interests in the regulation of insurance insolvency and circumvent the orderly liquidation of the Mission Companies. Furthermore, the portion of the Panel's Decision which holds that the *Burford* abstention based remand order is

a directly appealable final collateral order, conflicts with the decision of this Court in *Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969 (9th Cir. 1992).

II. PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

A. The Decision Erred as it Overlooks the Fact that this Action is Equitable in Nature.

This Court's Decision is based entirely upon the premise that the underlying suit is an action exclusively at law. Since this premise is incorrect, it follows that the Decision is incorrect.

1. The Complaint Seeks the Equitable Remedy of Declaratory Relief.

The First Cause of Action alleged in the underlying complaint [1] is an action for declaratory relief. California courts have recognized that "[a]n action for declaratory relief is equitable in nature." *Munson v. Linnick*, 255 Cal. App.2d 589, 63 Cal. Rptr. 340, 343 (1967). The California Court of Appeal has held that a plaintiff may seek "equitable relief by way of declaratory judgment" and that equity will grant complete relief in a declaratory action. *Bertero v. National General Corp.*, 254 Cal. App. 2d 126, 62 Cal. Rptr. 714, 720, 726 (1967). *See also, Postley v. Harvey*, 153 Cal. App.3d 280, 200 Cal. Rptr. 354, 357-58 (1984), quoting *E.L. White, Inc. v. City of Huntington Beach*, 21 Cal.3d 497, 507, 146 Cal. Rptr. 614, 579 P.2d 505 (1978). Accordingly, under California law, a state action for declaratory relief is not an action in which plaintiff seeks only legal relief. Since the Commissioner's First Cause of Action in the underlying Complaint is one for declaratory relief, his suit includes an action which involves equitable relief.

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[1] See Addendum, Ex. 1, pp. 1-32; Court Docket Sheet, Appellant's Excerpts of Record, Ex. 5, p. 90, item 1.

Federal courts have also recognized the equitable nature of declaratory judgment actions: "[t]he propriety of issuing a declaratory judgment may depend upon equitable considerations and should be '"informed by the teachings and experience concerning the functions and extent of federal judicial power."'" *Church of Scientology Int'l v. Kolts*, 846 F. Supp. 873, 883 (C.D.Cal. 1994), quoting *Green v. Mansour*, 474 U.S. 64, 72 (1985). The United States Supreme Court has stated that "'[a] declaratory judgment, *like other forms of equitable relief*, should be granted only as a matter of judicial discretion, exercised in the public interest." *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (emphasis added), quoting *Eccles v. Peoples Bank*, 333 U.S. 426, 431 (1948); *see also Sierra Club v. Yeutter*, 911 F.2d 1405, 1420, n.8 (10th Cir. 1990). "The judicial discretion which inheres in the declaratory judgment context should be exercised . . . in an 'equity-like' suit, in accordance with traditional equity principles." *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 493 (1st Cir. 1992); *see also First Fed. Sav. & Loan Ass'n v. Greenwald*, 591 F.2d 417, 424 (1st Cir. 1979). Additionally, federal courts "balance" several equitable factors in determining whether declaratory relief should be granted. *L. Perrigo Co. v. Warner-Lambert Co.*, 810 F. Supp. 897, 898-99 (W.D.Mich. 1992).[2][3]

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[2] These factors include whether the declaration would settle the controversy, would "serve a useful purpose in clarifying the legal relations in issue," is being used for "procedural fencing," or would increase friction between federal and state courts, or whether there is a more effective alternative remedy.

[3] While some federal courts have held that declaratory judgment actions, as creatures of statute, are inherently neither legal nor equitable, courts do ascertain whether the suit is grounded in law or equity by looking to the basic nature of the case and how the issues would have arisen in the absence of the Declaratory Judgment Act. *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 493 (1st Cir. 1992) ("without serious question, . . . this suit is equitable in nature, and therefore, governed by traditional principles of

Even apart from the First Cause of Action, the remaining causes of action in the underlying suit involve a massive effort by the Commissioner to marshal the billions of dollars of assets of the Mission Companies and to adjust billions of dollars in claims against those companies. The underlying litigation between Allstate and the Commissioner is thus more than a mere collection action at law. A declaration of the rights and interests of the parties under the reinsurance agreements serves, not only to permit the determination of a bundle of rights and duties between Allstate and the Mission Companies, but also furthers the rights and interests of innocent policyholders of the Mission Companies in the underlying state court insolvency proceedings, which, like bankruptcy proceedings, are inherently equitable in nature. *Kinder v. Superior Court*, 78 Cal. App.3d 574, 144 Cal. Rptr. 291, 296 (1978); *see also Morgan Stanley Mortgage Capital, Inc. v. Insurance Commissioner*, 18 F.3d 790, 794 (9th Cir. 1994); *Garamendi v. Executive Life Ins. Co.*, 17 Cal. App.4th 504, 21 Cal. Rptr.2d 578 (1993). Moreover, Allstate's admitted primary defense of set off is, in and of itself, a form of equitable relief and would be determined as a part of the declaratory relief action. *Prudential Reinsurance v. Superior Court*, 3 Cal. 4th 1118, 14 Cal. Rptr. 201 749, 842 P.2d 48 (1992). Thus, the major issues to be determined will be determined by the action for declaratory relief and involve issues of equity, as opposed to merely issues of law.

Since the single premise upon which the February 2, 1995 decision is based is in error, the Decision should be reconsidered, and this Court should approve the decision of the district court in abstaining and remanding the underlying action.

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equity jurisprudence"); *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1523 (11th Cir. 1987).

2. The Decision Substantially Interferes With a Comprehensive State Statutory Scheme.

Because of the insolvency of the Mission Companies, the rights and duties of the parties are governed by the comprehensive state statutory scheme contained in California Insurance Code Sections 1010, *et seq*. The declaratory relief cause of action in the underlying complaint seeks not only equitable relief, but also requires an interpretation of the rights and duties of the parties under the state's statutory scheme for liquidating insolvent insurers. The state statutory scheme and the proceedings held under it are also fundamentally equitable proceedings. *Kinder, Morgan Stanley, Garamendi, supra.*

Rehearing is required because the Decision threatens the entire liquidation process. This is demonstrated by a recent effort by Allstate to interfere with the liquidation proceedings based entirely upon the Decision.

Allstate now claims that because this Court decided that abstention based upon *Burford* is inappropriate, all of its claims against the Mission Companies, including claims asserted in the proofs of claim filed in the state court by Allstate, as mandated by the state statutes, must now be resolved in federal court, together with this litigation. These claims include the claims for set off. Please see Addendum, Ex. 2, pp. 33-34; and Ex. 4 and 5, pp. 50-58. Such a result would disregard the claims provisions of California Insurance Code Sections 1023 through 1035, among others, and would convert the statutory scheme from a state proceeding to one which would occur in federal court under an unknown set of rules. This would clearly interfere with the State's interest in an orderly liquidation process, particularly the adjudication of all claims against the assets of the insolvent estates in one forum. This task has been handled by the Mission Liquidation Court for nearly ten years, as that court has long assumed sole and exclusive jurisdiction to adjudicate

claims against the assets of the Mission Companies.[4] Thus, with the ink hardly dry on the Decision, it is being used directly to interfere with California's comprehensive statutory scheme. This is precisely the outcome cautioned against by the Commissioner and expressly prohibited by numerous courts throughout the country. Appellee's Answering Brief, pp. 8-10.

Allstate has even gone so far as to state that the Final Liquidation Dividend Plan, which was filed on December 28, 1994 and which contemplates a procedure for amending contingent, undetermined and/or unliquidated claims against the Mission estates to make them certain, a final liquidation dividend to be paid to claimants (a distribution of the estates' assets), and the ultimate closure of the estates, may not be pursued under the state statutes, but must proceed in federal court. This cannot be what this Court intended, nor is such an outcome countenanced by *New Orleans Public Service, Inc. v. Council of City Of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506 (1989) ("NOPSI")[5] or other cases deciding whether to apply *Burford* abstention in insurance insolvency cases.[6]

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[4] The Orders Appointing Conservator (October 31, 1985 and November 26, 1985), *see* Appellee's Excerpts of Record, Exs. 1-5, and Liquidator (February 24, 1987), *Id.*, Exs. 7-10, the Supplemental Order Appointing Liquidator and Restraining Order (March 5, 1987), *Id.*, Ex. 11, the Final Order of Rehabilitation (April 25, 1990), *Id.*, Ex. 12, and the Order Approving Final Liquidation Dividend Plan (December 28, 1994), Addendum, Ex. 3, pp. 35-49, all reiterate the Mission Liquidation Court's assumption of sole and exclusive jurisdiction to determine all claims against the assets of the Mission Companies' estates. These orders are all final and have not been challenged at any level. Allstate may not now complain about provisions of orders of which it had notice and failed to seek review. *Allstate Insurance Company v. Christopher John Hughes, et al., 174 B.R. 884 (1994).*

[5] A full discussion of the Court's misapplication of NOPSI is addressed in Section II, *infra*.

[6] Insurance Code Sections 1011 and 1058.

Allstate's proofs of claim in the Mission liquidation proceedings and the Commissioner's causes of action against Allstate will involve, among other things, a declaratory judgment as to claimed rights to set off by Allstate. The right to set off is historically an equitable action brought in chancery. *Prudential*, 14 Cal. Rptr. 2d at 751. The California Supreme Court has determined when set off is permissible under insolvency proceedings. *Prudential, supra.* The *Prudential decision* was based upon an interpretation of the provisions of the state insolvency statutes and California law. There is no doubt that certain kinds of set offs are permissible and some are not. The application of these rules is a matter of substantial state interest and the subject of significant controversy and litigation by numerous claimants and defendants throughout the liquidation proceedings.[7]

The purpose of the insurance insolvency statutes is to ensure uniform application of those laws to insolvent estates. *LacD'Amiante du Quebec v. American Home Assur. Co.*, 864 F.2d 1033, 1045 (3d Cir. 1988); *Blackhawk Heating & Plumbing Co. v. Geeslin*, 530 F.2d 154, 159-160 (7th Cir. 1976); *Todd v. Richmond*, 853 F. Supp. 1309, 1314-15 (D.Kan. 1994). One of these goals is the consistent application of statutes and local rules to the determination of the validity of claims against the estates. *Todd*, 853 F. Supp., 1314-1315. To permit entities such as Allstate, who have voluntarily submitted proofs of claim in the pending and ongoing insolvency proceedings, to now remove the issues involved in the approval or disapproval of those claims to a federal court, will certainly disrupt the state proceedings. Further, if Allstate is permitted to do so, then so may others. The end result would be a multitude of litigation with a number of federal courts administering the claims procedures for the State of California, instead of the claims being

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[7] See *Prudential, supra*; Ruling On Submitted Matter and Order Enforcing Reinsurance Commutation and Settlement Agreement with Imperial Casualty and Indemnity Co., Addendum, Ex. 6.

adjudicated in accordance with the state's statutory scheme. The likelihood of inconsistent rulings and the waste of estate and judicial assets is obvious.

Preventing the federal court from exercising its discretion to abstain frustrates the State's goal of establishing a uniform application of the laws governing insurance insolvency. Therefore, rehearing should be granted to correct the failure of the Court to recognize the fundamental equitable nature of the proceedings, including the equitable defense of set off.

B. Insurance Insolvency Proceedings Are Special Proceedings From Which Federal Courts Routinely Abstain Under *Burford*.

Insurance insolvency proceedings are special proceedings with very complex and interlocking considerations which cry out for *one* court to exercise jurisdiction over them. *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal. 2d 307, 74 P.2d 761, 773 (1937), *aff'd, Neblett v. Carpenter*, 305 U.S. 297 (1938).

Burford abstention is routinely exercised in insurance insolvency cases. A review of the case law involving *Burford* abstention throughout the federal courts reveals that courts regularly uphold *Burford* abstention in similar insurance insolvency cases.

In *Corcoran v. Ardra Insurance Company, Ltd.*, 842 F.2d 31 (2nd Cir. 1988), the Second Circuit confronted an almost identical situation. The district court abstained from exercising jurisdiction over a matter that arose out of an Insurance Commissioner's efforts to collect the reinsurance proceeds of an insolvent insurer. In *Ardra*, the Second Circuit held that the district court had not abused its discretion in either abstaining or in remanding the action to state court. In *Barnhardt v. Marine Ins. v. New England Intern. Sur.*, 961 F.2d 529 (5th Cir. 1992), the Fifth Circuit similarly upheld abstention involving an insurance insolvency. That case involved an action brought

by an insurance agent for breach of contract and unjust enrichment, (causes of action at law), against an insolvent insurer for unearned premiums on a contract which had been canceled by the Commisioner in the liquidation order. *See also Martin Insurance Agency Inc. v. Prudential Reinsurance Co.*, 910 F.2d 249 (5th Cir. 1990).

In *Hartford Casualty Insurance Co. v. Borg-Warner Corp.*, 913 F.2d 419 (7th Cir. 1990), the Seventh Circuit upheld the district court's decision to abstain under *Burford* because a federal court judgment would "upset the rehabilitation proceedings," *Id.* at 420, and "invade the province of the state rehabilitation court." *Id.* at 427. In *Hartford*, creditors brought claims against the parent and other subsidiaries of an insolvent insurer. In applying *Burford*, the Seventh Circuit determined that the federal litigation would overlap and disrupt the state court proceedings. *Id.* at 425-26. In *Grimes v. Crown Life Insurance Company*, 857 F.2d 699, 707 (10th Cir. 1988), cert. denied, 489 U.S. 1096 (1989), the Tenth Circuit reviewed a district court's rulings in favor of reinsurer defendants in an action brought by the Oklahoma Insurance Commissioner to obtain a declaration that would affect his ability to collect on the reinsurance contracts of an insurance company in liquidation. Like the instant case, the Commisioner had sought such a declaration in state court, but the reinsurer defendants removed the action to federal court. The Tenth Circuit held that, in light of the traditional federal deference to state receivership proceedings and the "complex and comprehensive procedures adopted for the liquidation of insolvent insurers," the district court should have abstained from exercising jurisdiction. *Id.* at 703-04.

C. The Panel's Decision Overlooks the Fact That Other Circuits and the Supreme Court Do Not Agree, Post-NOPSI That *Burford* Abstention Applies Only in Equitable Cases.

Even if the underlying cause of action were purely legal, the Decision is incorrect in holding that *Burford* abstention may not be granted in a case seeking only legal remedies. The Panel's Decision failed to give credence to the decisions in other federal circuits which hold that *Burford* abstention is not limited by the NOPSI dicta.

The Decision rests almost entirely upon the Panel's view of the U.S. Supreme Court's decision in NOPSI. The Supreme Court did not *hold* that *Burford* does not apply in actions at law nor was the Court postured to address that question. See, *Peat Marwick*, 923 F.2d at 278 (Mansmann, J., concurring). Indeed, several Supreme Court cases decided after NOPSI, directly conflict with an application of such a rule.

The Decision itself acknowledges Supreme Court cases decided before NOPSI which indicate that *Burford* abstention is not limited to cases where federal courts are "sitting in equity," [8] but fails to follow these cases. It seems inappropriate to recognize the precedential weight of these cases and then to disregard them in favor of NOPSI's unclear dicta and a dissenting opinion. In *Ankenbrandt v. Richards*, 112 S.Ct. 2206 (1992), plaintiff brought tort actions in a domestic relations case. While the Supreme Court found Burford abstention was inappropriate because there were no state court proceedings, it suggested that Burford abstention principles might be applicable in certain circumstances involving elements of the domestic relationship where a federal action was brought that would depend on the status of the parties which had not been determined in state proceedings. The Supreme Court had the opportunity to reach the result

[8] Opinion, at 1430, and fn. 10, 11.

reached by this Court's Decision, but significantly did not and left the door open for *Burford* abstention in actions at law. In *Tafflin v. Levitt*, 493 U.S. 455 (1990), the Supreme Court affirmed a Fourth Circuit decision which upheld Burford abstention in a RICO action for money damages. The action of the Supreme Court in *Tafflin* is inconsistent with this Court's interpretation of NOPSI.

Moreover, the Supreme Court and authoritative commentary suggest that *Burford* abstention is not limited to cases where the underlying action is in equity. Rather, the basis of the abstention doctrine is founded upon principles of federalism and comity. *See, Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 35 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315, 335-36 (1943) (Douglas, J. concurring); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941); *Younger v. Harris*, 401 U.S. 37, 44 (1971). As stated in 17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d S 4241 (1988):

> Considerations of federalism are at the heart of abstention. These considerations are too important to be made dependent on ancient distinctions about the powers of the several courts at Westminster Hall, and the ability of a federal court to defer to a state in a proper case ought not depend on whether the case is thought of as 'legal' or 'equitable.'

Although the Panel's Decision relies on Third, Second and First Circuit precedent, it failed to recognize that these circuits have reached contrary decisions. The recently decided Third Circuit case of *Riley v. Simmons*, —— F.3d ——, 1995 WL 19638 (3d Cir. Jan. 20, 1995) expressly undermines the Panel's reliance on *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 272 (3d Cir. 1991). Although the Third Circuit held that *Burford* abstention was not warranted in that case on other grounds, the court noted that it is not clear that Third Circuit decisions restricting *Burford* ab-

stention to equity have survived, nor that the reference to equity in NOPSI and *University of Maryland* is anything but dicta. *Riley*, 1995 WL 19638, at 16. The Panel also failed to reconcile *General Glass Co. v. Monsour Medical Found.*, 973 F.2d 197,202 (3rd Cir. 1992), another post-NOPSI Third Circuit decision, which refused to rule out abstention merely because the relief sought was for monetary damages.

The Panel's Decision also disregards the wealth of Second Circuit precedent *requiring Burford* abstention in insurance insolvency cases, instead reaching down to rely upon a Vermont District Court's decision in *Costel v. Fremont Indem. Co.*, 839 F. Supp. 265, 270 (D.Vt. 1993), which goes against the binding authority of the case law in the Second Circuit. *Levy v. Lewis*, 635 F.2d 960, 963 (2d Cir. 1980); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 43-44 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987); *Corcoran v. Ardra Ins. Co.*, 842 F.2d 31, 37 (2d Cir. 1988); *Capitol Indemnity Corp. v. Curiale*, —— F. Supp. ——, 1994 WL 722992 at 3-4 (S.D.N.Y. Dec. 30, 1994). Further, a recently-decided Second Circuit decision suggests that the Court's application of *Burford* abstention is not limited to cases where a federal court is sitting in equity. *Sheerbonnett, Ltd. v. American Exp. Bank Ltd.*, 17 F.3d 46 (2d Cir. 1994). This Court also failed to recognize the compelling reason to apply the Second Circuit precedent upholding *Burford* abstention in insurance insolvency cases, especially those cases arising under New York laws, because California's insurance insolvency statutes are modeled after New York's insurance insolvency laws. *Prudential*, 14 Cal. Rptr. 2d at 751, 755. The reliance on *Costle*, a case arising out of Vermont and which is contra to the overwhelming Second Circuit authority is inappropriate.[9]

[9] *Costle* is also distinguishable from this case on several material facts which appear to have been overlooked by the Court in rendering the Decision. First, in *Costle*, there was no exclusive forum for the adjudication of claims to the insolvent company's assets under either Vermont's statutes or the liquidation order. Whereas, here, Sections 1011 and 1058 in particular, and the various orders issued by the Mission Liquidation Court provide that the Superior Court of Los Angeles County is the venue for all proceedings regarding the assets of the Mission Companies. Second, in *Costle*, the court found that the McCarran Ferguson Act did not preempt the Federal Arbitration Act because it did not involve the business of insurance since the money sought to be collected in *Costle* was not being collected for distribution to policyholders. Instead, it was sought to reimburse the estate. Here, however, the reinsurance recoverable being collected will be distributed to policyholders and other creditors under the Plan. Therefore, factually and legally, the Decision fails to address material issues pointing to erroneous reliance on the decision in *Costle*.

The Court also did not adequately take into account the conflicting, post-NOPSI decisions in the First Circuit. The Court relied upon *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993), but failed to mention or address the First Circuit's earlier conflicting decision in *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991). In *Media Elements*, the First Circuit upheld abstention in an action at law in an insurance insolvency case. The plaintiff brought an action for personal injuries against an insolvent insurer, and the First Circuit found abstention appropriate where Puerto Rico's insurance insolvency laws were involved.

The Panel's Decision relies on cases decided by certain courts and then overlooks later decided cases finding *Burford* abstention appropriate. Accordingly, this matter is ripe for rehearing.

D. The Decision Conflicts with the Ninth Circuit's Earlier Decision in *Bennett v. Liberty Nat. Fire Ins. Co.* and with Decisions of Other Circuits Which Hold That a Remand Decision Based on Abstention is Appealable Only When it Involves a Separate Collateral Disputed Issue.

The Court's Decision overlooks and conflicts with the Ninth Circuit's own decision in *Bennett v. Liberty Nat.*

Fire Ins. Co., 968 F.2d 969 (9th Cir. 1992).[10] In *Bennett*, this Court concluded, "Because the court's arbitrability ruling removed the state court's power to order arbitration on remand, the order was immediately appealable." *Id.* at 971. The reasoning of *Bennett* suggests that the application of abstention, in and of itself, does not constitute a collateral disputed question. This Court's analysis in *Bennett* is consistent with the Second Circuit's decisions in *Karl Koch Erecting Co. v. New York Convention Center Development Corp.*, 838 F.2d 656 (2d Cir. 1988) (collateral dispute involved enforcement of a forum selection clause in a contract) and *Corcoran v. Ardra, supra* (remand order not appealable because lower court did not determine collateral disputed question on the merits such as enforceability of a forum-selection clause in a contract, *and abstention itself did not constitute the disputed collateral issue*) (emphasis added).

Here the district court's decision was based solely on abstention and did not decide any collateral issue on the merits regarding forum-selection clauses, arbitrability, or any other substantive issue. Indeed if the Decision stands, then all district court decisions that remand on grounds of abstention without determination of any substantive issue on the merits are automatically appealable, because abstention, without more, will now satisfy the element of a collateral disputed question.

Accordingly, because this Court's Decision failed to reconcile *Bennett* and its analysis of a collateral dispute, this Court should grant rehearing to correct its error in

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[10] The Commissioner, however, disapproves of *Bennett* to the extent that it erroneously holds that only if a court or arbitrator determines that funds belong to an insolvent estate does the money become part of the estate and until then the authority of the insolvency statute does not vest.

holding that the determination of the propriety of abstention alone satisfies the requirements of the *Cohen* collateral order doctrine.

III. CONCLUSION

For the foregoing reasons, the Commissioner respectfully request rehearing of the issues identified above, and/or rehearing *en banc*, as appropriate, for reasons set out in the statement of counsel.

Dated: February 15, 1995.

RUBINSTEIN & PERRY, P.C.

By /s/ Karl L. Rubinstein
KARL L. RUBINSTEIN
Attorneys for Appellee,
Insurance Commissioner

[Exhibit 1: Complaint in *Gillespie v. Allstate*, LASC Case No. C751868, omitted in printing]

EXHIBIT 2

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February 9, 1995

BY MESSENGER

Melissa S. Kooistra, Esq.
RUBINSTEIN & PERRY
355 South Grand Avenue, Suite 3100
Los Angeles, California 90071

Re: *Garamendi v. Allstate Insurance Company, et al., United States District Court, Central District of California, Case No. CV 90-4713 WMB (Gx)*

Dear Melissa:

My client, Allstate Insurance Company has sent me a copy of the "Order Approving Insurance Commissioner's Final Liquidation Dividend Plan, Establishing Final Claims Bar Date For Contingent, Unliquidated, And/Or Undetermined Claims And Related Orders And Setting Hearing Date" dated December 28, 1994 (the "December 28 Order"). The December 28 Order contains provisions regarding unliquidated or undetermined claims pending against the estate of certain Mission Group companies (collectively, "Mission") and the Commissioner's ability to recover for unliquidated and undetermined claims against Mission's reinsurers. The Order also purports to exercise sole and exclusive jurisdiction over the Mission estate.

As you know, the Commissioner's claims against Allstate on Mission's behalf, together with Allstate's defense

of setoff against those claims, are pending before the United States District Court in the above-referenced action ("the Federal Action"). All issues respecting balances owed to Mission on reinsurance assumed by Allstate, and all issue respecting Allstate's right of setoff, will be determined in the Federal Action (or, in the event Allstate's motion to compel arbitration is granted, in an arbitral forum subject to the oversight of the District Court). Although Allstate has filed claims against Mission for balances due from Mission (principally or solely as the result of reinsurance ceded or retroceded to Mission), those claims were filed solely to preserve Allstate's right of setoff. Indeed, the Commissioner has long made it clear that there will be insufficient assets to pay anything to creditors such as Allstate. If this is no longer accurate, please so advise me in writing.

For the above reasons, Allstate believes that the December 28 Order has no application to it. Although the Order purports to exercise exclusive jurisdiction over Mission's estate (December 28 Order, ¶ 2), obviously this cannot oust the federal court of jurisdiction over the Federal Action. Likewise, although the December 28 Order purports to address the Commissioner's right to recover unliquidated and undetermined claims (such as IBNR) against Mission's reinsurers (*id.*, ¶ 7), such provisions can have no application to the Federal Action, except insofar as the Superior Court may restrict the Commissioner's authorization to pursue claims on Mission's behalf.

There is some uncertainty as to the impact of the December 28 Order on unliquidated and undetermined claims by Mission and against Mission. Allstate understands that Order is meant to be reciprocal, so that the same limitations are imposed with respect to unliquidated and undetermined claims against Mission's estate (including claims of offset) and those claims by Mission against reinsurers. Allstate reserves its right to object to the December 28 Order to the extent the Commissioner con-

tends (1) the Order permits the Commissioner to recover certain unliquidated or undetermined claims (such as IBNR) that are barred insofar as such claims are brought against Mission, and (2) the Order applies to Allstate notwithstanding the fact that all claims vis-a-vis Allstate and Mission are pending in the Federal Action. If the Commissioner in fact makes such a contention, please so advise me in writing no later than 5:00 p.m. on Monday, February 13, 1995.

Sincerely,

/s/ Joseph D. Lee
JOSEPH D. LEE

JDL:rcl

EXHIBIT 3

[Filed Dec. 28, 1994]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No.: C 572 724

JOHN R. GARAMENDI, Insurance Commissioner
of the State of California,
Applicant,
vs.
MISSION INSURANCE COMPANY,
a California corporation,
Respondent.

Consolidated with Case Numbers
C 576 324; C 576 416;
C 576 323; C 576 325; C 629709

ORDER APPROVING INSURANCE COMMISSIONER'S FINAL LIQUIDATION DIVIDEND PLAN, ESTABLISHING FINAL CLAIMS BAR DATE FOR CONTINGENT, UNLIQUIDATED, AND/OR UNDETERMINED CLAIMS AND RELATED ORDERS AND SETTING HEARING DATE

On December 28, 1994, John Garamendi, Insurance Commissioner of the State of California (the "Commis-

sioner"), in his capacity as Liquidator and Trustee of the Mission Insurance Company Trust, Mission National Insurance Company Trust, and Enterprise Insurance Company Trust, submitted his Application to Establish a Final Liquidation Dividend Plan, to Establish a Final Claims, Bar Date for Contingent, Unliquidated and/or Undetermined Claims and for Related Orders relating to Mission Insurance Company, Mission National Insurance Company, and Enterprise Insurance Company, and the Trusts created by this Court with respect to said companies (the "Mission Companies" or the "Mission Trusts"). The Court, having considered the Insurance Commissioner's Application, the circumstances of the Mission Trusts, the applicable law and the arguments of counsel, and good cause appearing therefor, finds that the Application to Establish Final Liquidation Dividend Plan, to Establish Final Claims Bar Date for Contingent, Unliquidated, and/or Undetermined Claims and for Related Orders is fair, reasonable, and necessary to the orderly liquidation of the Mission Companies and/or Mission Trusts, and that the same should forthwith be approved;

IT IS THEREFORE HEREBY FOUND, DETERMINED, ORDERED, ADJUDGED AND DECREED THAT:

1. The Application of the Insurance Commissioner to Establish Final Liquidation Dividend Plan, to Establish Final Claims Bar Date for Contingent, Unliquidated, and/or Undetermined Claims and for Related Orders is granted. A hearing is hereby set for 10:00 a.m. on the 16th day of February, 1995, in Department 4, at which time any and all persons or other legal entities desiring to object to, comment on, present evidence or comments with respect to, or in any other way deal with the Commissioner's Application or this Order must do so (the "Hearing"). Any such objections, comments, or other matters relating to the subject matter herein must be made at such hearing or the same shall be irrevocably deemed waived.

2. Any and all contingent, unliquidated, and/or undetermined claims, of any kind or nature, which were previously filed on a timely basis (by September 12, 1987), and in a proper form, must be amended as liquidated claims or otherwise converted to determined and non-contingent claims by use of and pursuant to instructions in a form to be approved by this Court prior to the Hearing. Such amended claims must be filed with the Commissioner no later than August —, 1995 (the "Final Dividend Claims Bar Date"), together with proper proofs thereof, in accordance with the provisions of California Insurance Code Section 1010, *et seq.*, including but not limited to Section 1023 of the California Insurance Code. Any contingent, unliquidated, and/or undetermined claims not so amended by the Final Dividend Claims Bar Date shall be conclusively deemed forever waived. The rights and liabilities of the Mission Companies and/or the Mission Trusts and of creditors, policyholders, shareholders and all other persons interested in the assets of the Mission Companies and/or the Mission Trusts, including the State of California, have heretofore been fixed as of February 24, 1987 and shall remain so fixed. This Court continues to assert and to maintain sole and exclusive judisdiction, to the exclusion of all other courts or tribunals, over and to all assets of the Mission Companies and/or the Mission Trusts of whatsoever kind or nature and wherever or however owned or held. No liens, judgments, awards or claims of any kind not entered by this Court in accordance with the previous Orders of this Court, all of which Orders are hereby reaffirmed, shall be valid as against the Mission Companies and/or the Mission Trusts or any of their said assets.

3. The Commissioner shall provide Notice of this Order and the Hearing in the form and content of Exhibit A annexed hereto to all policyholders, IGAs and other creditors or entities interested in the assets of the Mission Companies and/or the Mission Trusts or in these proceedings who previously timely and properly filed contingent, un-

liquidated, and undetermined claims. This Notice shall be provided by mailing a copy of the Notice to all policyholders, IGAs and other creditors or entities interested in the assets of the Mission Companies and/or the Mission Trusts or in these proceedings who previously timely and properly filed contingent, unliquidated, and undetermined claims at their addresses as shown in the records of the Mission Companies and/or the Mission Trusts and by publication in *The Wall Street Journal* and *U.S.A. Today* for a period of at least two days and in a newspaper of general circulation, published in Los Angeles County, once a week for four consecutive weeks. The Commissioner shall provide the same notice to the various state insurance commissioners, or equivalent, and the various state insurance guaranty associations, or equivalent. The Court finds that such notice is reasonably calculated to and does provide fair, reasonable and adequate notice of these proceedings, the Application, this Order, and the Hearing.

4. Any and all claims previously barred by prior orders or procedures herein shall remain barred. Any and all claims previously timely and properly filed as contingent, unliquidated, or undetermined claims, in whole or in part, are forever barred from participation in the "Final Dividend" (as defined below) unless they are amended to be liquidated and/or determined claims upon or prior to the Final Dividend Claims Bar Date. A "Contingent," "Unliquidated" or "Undetermined Claim" within the meaning of these proceedings shall be as defined in California Insurance Code Section 1025 as any claim or demand upon which a right of action had accrued at the date of the order of liquidation herein upon which the liability has not been determined or the amount thereof liquidated. Accordingly, any previously timely and properly filed Contingent, Unliquidated and/or Undetermined Claim must be made certain, both as to liability of the Mission Companies and/or the Mission Trusts or one of them, and as to the amount of such liability no later

than the Final Dividend Claims Bar Date or such claims shall be forever barred from any participation in the Final Dividend. Any claim which is partly Contingent, Unliquidated and/or Undetermined shall be subject to these provisions as to the Contingent, Unliquidated and/or Undetermined portions of such claim. If a claim is certain as to liability, but Contingent, Undetermined, or Unliquidated as to amount, the amount may be determined by application of standard actuarial principles which calculate the present value of the claim in a reasonable manner, subject to the Commissioner's agreement based upon the opinions and actuarial studies of an independent actuarial firm retained by the Commissioner in his sole discretion.

5. Within a reasonable time after the Final Dividend Claims Bar Date, on a date determined by the Commissioner in his sole discretion, the Commissioner shall cause all such amended claims to be reviewed, evaluated and either accepted or rejected; any such claim which is approved shall be entitled to participate in the Final Dividend; and any claim which is rejected shall be subject to and governed by California Insurance Code Section 1032 and may participate in the Final Dividend only if it is allowed after compliance with such Section.

6. As soon as practical after the Final Dividend Claims Bar Date, on a date determined by the Commissioner in his sole discretion (the "Final Dividend Determination Date"), the Commissioner shall determine the total liabilities of the Mission Companies and/or the Mission Trusts as a result of all allowed claims and shall determine the total assets available to discharge such claims and the Final Dividend payable to the holder of an allowed claim (including IGAs) shall be calculated by the "Final Dividend Formula," the numerator of which shall be the total "Available Assets" and the denominator of which shall be the "Total Liabilities" of the Mission Companies and/or the Mission Trusts. The Total Liabilities of the Mis-

sion Companies and/or the Mission Trusts shall include a reserve for future operational expenses of the Mission Trusts.

The Commissioner's determination of the Available Assets, the Total Liabilities and the Final Dividend Formula shall be a part of his administrative determination as to allowance of claims and the Commissioner shall file notice of his determination of Available Assets, the Total Liabilities and the Final Dividend Formula with the Court and shall provide reasonable notice thereof to the holders of all allowed claims.

Any holder of an allowed claim shall have thirty (30) days after such notice to seek a show-cause order under California Insurance Code Section 1032 to dispute the amount of the Available Assets, Total Liabilities or the Final Dividend. In the absence of obtaining such a show-cause order and a subsequent order from this Court providing for the modification of such determinations, the Commissioner's determinations of the Available Assets, Total Liabilities and Final Dividend Formula shall be conclusive and binding.

The Final Dividend shall be determined by multiplying the Final Dividend Formula times the non-contingent, liquidated, and determined amount of each allowed claim.

7. The liability of all reinsurers to the Mission Companies and/or the Mission Trusts shall be determined based upon the present value of all claims which have been or may be allowed herein based upon the procedures utilized heretofore and as set out above, as determined by reasonable and standard actuarial practices and claims procedures; such liability shall include the present value of the future development and/or Incurred But Not Reported loss component of any such claims.

8. After the calculation of the Final Dividend Formula, the Commissioner shall, in due course, discharge all claims allowed in accordance with the foregoing proce-

dures by paying each claimant, including IGAs, an amount equal to the Final Dividend Payment.

9. Any claims which are not liquidated and determined by the Final Dividend Claims Bar date may not participate in any portion of the Final Dividend.

10. The Commissioner shall continue to marshal the assets of the Mission Companies and/or the Mission Trusts and shall conclude pending litigation as quickly as practical. Any further net sums recovered after the Final Dividend Determination Date shall be distributed by the Commissioner, less operating expenses and appropriate reserves as determined by the Commissioner in his sole discretion, to the holders of allowed claims pro rata based upon the Final Dividend Formula.

11. The Commissioner shall wind up the affairs of the Mission Companies and/or the Mission Trusts and file a final report to the Court as soon as practical after carrying out the foregoing.

12. The obligations of IGA's, if any, for the Tail developing on "covered" claims will be unaffected by the Final Dividend Approach. IGA's shall continue to be liable for "covered" claims within the meaning of the applicable laws of the various states.

13. The foregoing Final Dividend Approach is reasonable and necessary to the welfare of the public and of the policyholders and creditors of the Mission Companies and/or the Mission Trusts.

14. All prior injunctions and other orders of this Court, except to the extent expressly modified herein, are reaffirmed and remain in full force and effect. All powers or authority granted to the Commissioner herein are in addition to and not in limitation of the powers of the Commissioner under the Insurance Code and the applicable case law.

DATED: Dec. 28, 1994

/s/ Kurt J. Lewin
THE HONORABLE KURT J. LEWIN
Judge of the Superior Court

EXHIBIT A

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No.: C 572 724

JOHN R. GARAMENDI, Insurance Commissioner
of the State of California,
Applicant,

vs.

MISSION INSURANCE COMPANY,
a California corporation,
Respondent.

Consolidated with Case Numbers
C 576 324; C 576 416; C 576 323;
C 576 325; C 629709

NOTICE OF ORDER APPROVING INSURANCE COMMISSIONER'S FINAL LIQUIDATION DVIDEND PLAN, ESTABLISHING FINAL CLAIMS BAR DATE FOR CONTINGENT, UNLIQUIDATED, AND/OR UNDETERMINED CLAIMS, AND RELATED ORDERS

[PROPOSED]

TO ALL POLICYHOLDERS, CREDITORS, INSURANCE GUARANTY ASSOCIATIONS, AND OTHER PERSONS AND ENTITIES INTERESTED IN MIS-

SION ISURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST (collectively the "Mission Companies" or the "Mission Trusts"), OR THEIR ASSETS, WHO PREVIOUSLY TIMELY AND PROPERLY FILED CONTINGENT, UNLIQUIDATED, AND/OR UNDETERMINED CLAIMS:

PLEASE TAKE NOTICE THAT:

On December —, 1994, this Court entered its Order Approving Final Liquidation Dividend Plan, Establishing Final Claims Bar Date for Contingent, Unliquidated, and/or Undetermined Claims and Related Orders (the "Order"), which order provides as follows:

1. The Application of the Insurance Commissioner to Establish Final Liquidation Dividend Plan, to Establish Final Claims Bar Date for Contingent, Unliquidated, and/or Undetermined Claims, and for Related Orders is granted. A hearing is hereby set for 10:00 a.m. on the —— day of February, 1995, in Department 4, at which time any and all persons or other legal entities desiring to object to, comment on, present evidence or comments with respect to, or in any other way deal with the Commissioner's Application or this Order must do so (the "Hearing"). Any such objections, comments, or other matters relating to the subject matter herein must be made at such hearing or the same shall be irrevocably deemed waived.

2. Any and all contingent, unliquidated, and/or undetermined claims, of any kind or nature, which were previously filed on a timely basis (by September 12, 1987), and in a proper form, must be amended as liquidated claims or otherwise converted to determined and non-contingent claims by use of and pursuant to the instructions in a form to be approved by this Court prior to the Hearing. Such amended claims must be filed with the Commissioner no later than August —, 1995 (the "Final Dividend Claims Bar Date"), together with proper proofs thereof, in accordance with the provisions of California Insurance Code Section 1010, *et seq.*, including but not limited to Section 1023 of the California Insurance Code. Any contingent, unliquidated, and/or undetermined claims not so amended by the Final Dividend Claims Bar Date shall be conclusively deemed forever waived. The rights and liabilities of the Mission Companies and/or the Mission Trusts and of creditors, policyholders, shareholders and all other persons interested in the assets of the Mission Companies and/or the Mission Trusts, including the State of California, have heretofore been fixed as of February 24, 1987 and shall remain so fixed. This Court continues to assert and to maintain sole and exclusive jurisdiction, to the exclusion of all other courts or tribunals, over and to all assets of the Mission Companies and/or the Mission Trusts of whatsoever kind or nature and wherever or however owned or held. No liens, judgments, awards or claims of any kind not entered by this Court in accordance with the previous Orders of this Court, all of which Orders are reaffirmed, shall be valid as against the Mission Companies and/or the Mission Trusts or any of their said assets.

3. The Commissioner shall provide Notice of this Order and the Hearing in the form and content of Exhibit A annexed hereto all policyholders, IGAs and other creditors or entities interested in the assets of the Mission Companies and/or the Mission Trusts or in these proceedings who previously timely and properly filed contingent, unliquidated, and undetermined claims. This Notice shall be provided by mailing a copy of the Notice to all policyholders, IGAs and other creditors or entities interested in the assets of the Mission Companies and/or the

Mission Trusts or in these proceedings who previously timely and properly filed contingent, unliquidated, and undetermined claims at their addresses as shown in the records of the Mission Companies and/or the Mission Trusts and by publication in *The Wall Street Journal* and *U.S.A. Today* for a period of at least two days and in a newspaper of general circulation, published in Los Angeles County, once a week for four consecutive weeks. The Commissioner shall provide the same notice to the various state insurance commissioners, or equivalent, and the various state insurance guaranty associations, or equivalent. The Court finds that such notice is reasonably calculated to and does provide fair, reasonable and adequate notice of these proceedings, the Application, this Order, and the Hearing.

4. Any and all claims previously barred by prior orders or procedures herein shall remain barred. Any and all claims previously timely and properly filed as, contingent, unliquidated, or undetermined claims, in whole or in part, are forever barred from participation in the "Final Dividend" (as defined below) unless they are amended to be liquidated and/or determined claims upon or prior to the Final Dividend Claims Bar Date. A "Contingent," "Unliquidated" or "Undetermined Claim" within the meaning of these proceedings shall be as defined in California Insurance Code Section 1025 as any claim or demand upon which a right of action had accrued at the date of the order of liquidation herein upon which the liability has not been determined or the amount thereof liquidated. Accordingly, any previously timely and properly filed Contingent, Unliquidated and/or Undetermined Claim must be made certain, both as to liability of the Mission Companies and/or the Mission Trusts or one of them, and as to the amount of such liability no later than the Final Dividend Claims Bar Date or such claims shall be forever barred from any participation in the Final Dividend. Any claim which is partly Contingent, Unliquidated and/or

Undetermined shall be subject to these provisions as to the Contingent, Unliquidated and/or Undetermined portions of such claim. If a claim is certain as to liability, but Contingent, Undetermined, or Unliquidated as to amount, the amount may be determined by application of standard actuarial principles which calculate the present value of the claim in a reasonable manner, subject to the Commissioner's agreement based upon the opinions and actuarial studies of an independent actuarial firm retained by the Commissioner in his sole discretion.

5. Within a reasonable time after the Final Dividend Claims Bar Date, on a date determined by the Commissioner in his sole discretion, the Commissioner shall cause all such amended claims to be reviewed, evaluated and either accepted or rejected; any such claim which is approved shall be entitled to participate in the Final Dividend; and any claim which is rejected shall be subject to and governed by California Insurance Code Section 1032 and may participate in the Final Dividend only if it is allowed after compliance with such Section.

6. As soon as practical after the Final Dividend Claims Bar Date, on a date determined by the Commissioner in his sole discretion (the "Final Dividend Determination Date"), the Commissioner shall determine the total liabilities of the Mission Companies and/or the Mission Companies as a result of all allowed claims and shall determine the total assets available to discharge such claims and the Final Dividend payable to the holder of an allowed claim (including IGAs) shall be calculated by the "Final Dividend Formula," the numerator of which shall be the total "Available Assets" and the denominator of which shall be the "Total Liabilities" of the Mission Companies and/or the Mission Trusts. The Total Liabilities of the Mission Companies and/or the Mission Trusts shall include a reserve for future operational expenses of the Mission Companies and/or the Mission Trusts.

The Commissioner's determination of the Available Assets, the Total Liabilities and the Final Dividend Formula shall be a part of his administrative determination as to allowance of claims and the Commissioner shall file notice of his determination of Available Assets, the Total Liabilities and the Final Dividend Formula with the Court and shall provide reasonable notice thereof to the holders of all allowed claims.

Any holder of an allowed claim shall have thirty (30) days after such notice to seek a show-cause order under California Insurance Code Section 1032 to dispute the amount of the Available Assets, Total Liabilities or the Final Dividend. In the absence of obtaining such a show-cause order and a subsequent order from this Court providing for the modification of such determinations, the Commissioner's determinations of the Available Assets, Total Liabilities and Final Dividend Formula shall be conclusive and binding.

The Final Dividend shall be determined by multiplying the Final Dividend Formula times the non-contingent, liquidated, and determined amount of each allowed claim.

7. The liability of all reinsurers to the Mission Companies and/or the Mission Trusts shall be determined based upon the present value of all claims which have been or may be allowed herein based upon the procedures utilized heretofore and as set out above, as determined by reasonable and standard actuarial practices and claims procedures; such liability shall include the present value of the future development and/or Incurred But Not Reported loss component of any such claims.

8. After the calculation of the Final Dividend Formula, the Commissioner shall, in due course, discharge all claims allowed in accordance with the foregoing procedures by paying each claimant, including IGAs, an amount equal to the Final Dividend Payment.

9. Any claims which are not liquidated and determined by the Final Dividend Claims Bar date may not participate in any portion of the Final Dividend.

10. The Commissioner shall continue to marshall the assets of the Mission Companies and/or the Mission Trusts and shall conclude pending litigation as quickly as practical. Any further net sums recovered after the Final Dividend Determination Date shall be distributed by the Commissioner, less operating expenses and appropriate reserves as determined by the Commissioner in his sole discretion, to the holders of allowed claims pro rata based upon the Final Dividend Formula.

11. The Commissioner shall wind up the affairs of the Mission Companies and/or the Mission Trusts and file a final report to the Court as soon as practical after carrying out the foregoing.

12. The obligations of IGA's, if any, for the Tail developing on "covered" claims will be unaffected by the Final Dividend Approach. IGA's shall continue to be liable for "covered" claims within the meaning of the applicable laws of the various states.

13. The foregoing Final Dividend Approach is reasonable and necessary to the welfare of the public and of the policyholders and creditors of the Mission Companies and/or the Mission Trusts.

14. All prior injunctions and other orders of this Court, except to the extent expressly modified herein, are reaffirmed and remain in full force and effect. All powers or authority granted to the Commissioner herein are in addition to and not in limitations of the powers of the Commissioner under the Insurance Code and the applicable case law.

DATED: _____

KARL L. RUBINSTEIN
Special Deputy
Insurance Commissioner
DANA CARLI BROOKS
MELISSA S. KOOISTRA
RUBINSTEIN & PERRY, P.C.

By: _____
KARL L. RUBINSTEIN
Attorneys for
Insurance Commissioner

EXHIBIT 4

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
600 South Commonwealth Avenue
Los Angeles, California 90005

GEORGE DEUKMEJIAN, Governor

[State Seal]

January 11, 1988

ALLSTATE INSURANCE COMPANY
D.W. K.
51 W. Higgins Rd.
South Barrington IL 60010

Reference: Liquidation of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Holland-America Insurance Company, Mission Reinsurance Corporation

Liquidator's Claim No: R2764
Reinsurance Treaty or certificate No:
Clm # 43
Date of Loss:

The Insurance Commisioner, in her capacity as Liquidator, acknowledges receipt of your claim filed in the liquidation proceedings of the above referenced company. This acknowledgment does not constitute approval nor denial of your claim.

Please continue to provide the company with your normal reports and direct them to:

Mission Insurance Company in Liquidation
Reinsurance Accounting
2600 Wilshire Boulevard
Los Angeles, California 90057

Attention: John Horner

The reports and other data you supply to the Reinsurance Accounting Section will be considered supplements to your claim.

Please use the above Liquidator's Claim No. in any future correspondence and advise this office in writing of any change of address.

You should only receive further correspondence concerning your claim if more information is needed, or if your claim is rejected in whole or in part.

Very truly yours,

Ronald G. Rosen
Deputy Insurance Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
P.O. Box 76869
Los Angeles, California 90076-0869
(213) 389-9500

Reinsurance Treaty or Certificate number: See attached listing

Allstate Claim No. 43

PROOF OF CLAIM
(For reinsurers)

(Please Print) Total Amount of Claim: $ Contingent and Undetermined

Brief Explanation of Claim: Business assumed from Mission Group (use additional pages if necessary).

NOTE

Please supply any SUPPORTING DOCUMENTS such as contracts, bills, court judgments, police reports, etc., if they were not previously supplied.

Social Security No. or Tax I.D. No.: 36-0719665

Name: Allstate Insurance Company

Address: 51 West Higgins Road, South Barrington, IL 60010

Telephone No.: (312) 551-2091

UNLESS NOTED HEREIN, I ALONE AM ENTITLED TO FILE THIS CLAIM. NO OTHERS HAVE AN INTEREST THEREIN. THE CLAIM IS UNSECURED. NO PAYMENTS HAVE BEEN MADE THEREON. THE SUM CLAIMED IS JUSTLY OWING AND THERE IS NO OFFSET.

I DECLARE, UNDER PENALTY OF PERJURY, THAT THE ABOVE INFORMATION IS TRUE AND CORRECT.

/s/ [Illegible] 8-28-87
Signature of Claimant Date

Mail the completed form and supporting documents to: The Insurance Commissioner as Liquidator, P.O. Box 76869, Los Angeles, California 90076-0869. Notify the Liquidator, In writing, of all changes of address.

Final Date for Filing is: September 12, 1987

Reference:

EXHIBIT "A" to CEDING REINSURERS PROOF OF CLAIM

Treaty or Contract Identification No.: See attached listing

Facultative Certificate No.:

Intermediary or Broker: See attached listing

Paid Losses [1] as of _____ : $ [2]
(Date)

Cases Reserves as of _____ : $
(Date)

Estimated IBNR as of _____ : $

Other: _____ : $
(Explain)

Total Without Regard to any offsets claimed in arriving at any net amounts you claim are due: $_____

OFFSETS [3]:

Allstate reserves the right to offset balances on assumed contracts from companies in the Mission Group against amounts due the Allstate Group on business ceded to the Mission Group.

---

[1] This amount of your claim will be considered as a specific, determined amount. The remainder will be deemed as an undetermined and contingent amount.

[2] All amounts shall be stated in U.S. Dollars.

[3] You are requested to explain the nature and basis of offsets which you are using to arrive at amounts owed to you, if any. Offsets should include the premiums you owe, if any. Please see the instructions in the letter from the Liquidator. You may attach any additional explanations regarding these offsets.

Allstate further reserves the right to amend the figures on this claim as further information becomes available.

$_____

TREATY NO.	BROKER	BUSINESS ASSUMED FROM
881	Carpenter	Mission American
1680	Carpenter	" "
3022	Carpenter	" "
10061	Carpenter	" "
362	Intere	Mission Ins. Co.
363	Sterling	" " "
499	Intere	" " "
988	Intere	" " "
10231	Intere	" " "
3524	Carpenter	" " "
5337	Reins. Co.	" " "

EXHIBIT 5

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
P.O. Box 76869
Los Angeles, California 90076-0869
(213) 389-9500

Reinsurance Treaty or
Certificate Number:

Contingent
Various—See attached
Allstate Claim No: 24

PROOF OF CLAIM
(For Reinsurers)

(Please Print) Total amount of claim: $ Contingent and Undetermined

BRIEF EXPLANATION OF CLAIM: Business ceded to the Mission Insurance Company from Allstate Insurance Company as the successor to Northbrook Excess & Surplus Insurance Company.

(use additional pages if necessary).

NOTE

Please supply any SUPPORTING DOCUMENTS such as contracts, bills, court judgments, police reports, etc., if they were not previously supplied.

Social Security No. or Tax I.D. No.: 36-0719665

Name: Allstate Insurance Company

Address: 51 W. Higgins Road, South Barrington, IL 60010

Telephone No.: (312) 551-2091

UNLESS NOTED HEREIN, I ALONE AM ENTITLED TO FILE THIS CLAIM. NO OTHERS HAVE AN INTEREST THEREIN. THE CLAIM IS UNSECURED. NO PAYMENTS HAVE BEEN MADE THEREON, THE SUM CLAIMED IS JUSTLY OWING AND THERE IS NO OFFSET.

I DECLARE, UNDER PENALTY OF PERJURY, THAT THE ABOVE INFORMATION IS TRUE AND CORRECT.

/s/ [Illigible] — 8-28-87
Signature of Claimant — Date

Mail the completed form and supporting documents to: The Insurance Commissioner as Liquidator, P.O. Box 76869, Los Angeles, California 90076-0869. Notify the Liquidator. In writing, of all changes of address.

Final Date for Filing is: September 12, 1987

Reference:

EXHIBIT "A" TO CEDING REINSURERS PROOF OF CLAIM

Treaty or Contract Identification No.: Various (see attached)

Facultative Certificate No.: Various

Intermediary or Broker: Various

Paid Losses [1] as of March 31, 1987:	$	.00 [2]
Case Reserves as of March 31, 1987:	$	.00
Estimated IBNR as of March 31, 1987:	$	.00
Other: (explain) _____	$	.00
Total, without regard to any offsets Claimed in arriving at any net amounts you claim are due:	$	.00

OFFSETS [3]: Allstate reserves the right to offset the amounts due to companies in the Mission Group on reinsurance assumed by Allstate against amounts due Allstate for business ceded to the Mission Group. Allstate further reserves the right to amend the figures on this claim as further information becomes available.

---

[1] This amount of your claim will be considered as a specific, determined amount. The remainder will be deemed as an undetermined and contingent amount.

[2] All amounts shall be stated in U.S. Dollars.

[3] You are requested to explain the nature and basis of offsets which you are using to arrive at amounts owed to you, if any. Offsets should include the premiums you owe, if any. Please see the instructions in the letter from the Liquidator. You may attach any additional explanations regarding these offsets.

ALLSTATE INSURANCE COMPANY
NESCO DIVISION
REPORT 100257
ACCOUNT SUMMARY
AS OF MARCH 31 1987

Contract Number	Description	Ceded Assumed	Broker	Partic.	Eff. Date	Account Receivable	Account Payable	Outstanding Reserves	UPR
202013	Facultative	Ceded	A. Miller	Various	Various	.00	.00	0	.00
100030	Facultative	Ceded	Direct	Various	Various	.00	.00	0	.00
202085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
202085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
202035	Facultative	Ceded	Rein. Fac	Various	Various	.00	.00	0	.00
200138	Facultative	Ceded	JL Kelley	Various	Various	.00	.00	0	.00
202016	Facultative	Ceded	Irland	Various	Various	.00	.00	0	.00
202058	Facultative	Ceded	Carpenter	Various	Various	.00	.00	0	.00
200101	Facultative	Ceded	Kerwick	Various	Various	.00	.00	0	.00
200133	Facultative	Ceded	TA Greene	Various	Various	.00	.00	0	.00
200133	Facultative	Ceded	TA Greene	Various	Various	.00	.00	0	.00
000302	Cat XS 1st Cat	Ceded	GL Hodson		4/1/75	.00	.00	0	.00
200128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
200085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
200129	Facultative	Ceded	GL Hodson	Various	Various	.00	.00	0	.00
200116	Facultative	Ceded	Dependabl	Various	Various	.00	.00	0	.00
200035	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00

200095	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
204128	Facultative	Ceded	Nova Re.	Various	Various	.00	.00	0	.00
200085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
204131	Facultative	Ceded	Triad Uno	Various	Various	.00	.00	0	.00
200071	Facultative	Ceded	Peterson	Various	Various	.00	.00	0	.00
203128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
202135	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
200036	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
203085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
200043	Facultative	Ceded	Baringer	Various	Various	.00	.00	0	.00
203085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
209141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
100030	Facultative	Ceded	Direct	Various	Various	.00	.00	0	.00
202071	Facultative	Ceded	Peterson	Various	Various	.00	.00	0	.00
200013	Facultative	Ceded	A. Miller	Various	Various	.00	.00	0	.00
202095	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
202116	Facultative	Ceded	Dependabl	Various	Various	.00	.00	0	.00
204128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
200135	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
202013	Facultative	Ceded	A. Miller	Various	Various	.00	.00	0	.00
000305	Cat XS 1st Cat	Ceded	GL Hodson	3.00	4/1/78	.00	.00	0	.00
200141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
200095	Facultative	Ceded	Rein. Fac	Various	Various	.00	.00	0	.00
203058	Facultative	Ceded	Carpenter	Various	Various	.00	.00	0	.00

Contract Number	Description	Ceded Assumed	Broker	Partic.	Eff. Date	Account Receivable	Account Payable	Outstanding Reserves	UPR
200044	Facultative	Ceded	Baringer	Various	Various	.00	.00	0	.00
204085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
200058	Facultative	Ceded	Carpenter	Various	Various	.00	.00	0	.00
203116	Facultative	Ceded	Dependabl	Various	Various	.00	.00	0	.00
200125	Facultative	Ceded	Reins. Ser	Various	Various	.00	.00	0	.00
200125	Facultative	Ceded	Int. Serv.	Various	Various	.00	.00	0	.00
200115	Facultative	Ceded	Tre Fac	Various	Various	.00	.00	0	.00
206141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
200115	Facultative	Ceded	Tre Fac	Various	Various	.00	.00	0	.00
205125	Facultative	Ceded	Reins Ser	Various	Various	.00	.00	0	.00
200101	Facultative	Ceded	Kerwick	Various	Various	.00	.00	0	.00
200095	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
204141	Facultative	Coded	E&S Inter	Various	Various	.00	.00	0	.00
200058	Facultative	Ceded	Carpenter	Various	Various	.00	.00	0	.00
202128	Facultative	Ceded	Nova Re.	Various	Various	.00	.00	0	.00
200035	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
202129	Facultative	Ceded	GL Hodson	Various	Various	.00	.00	0	.00
000505	Cat XS 1st Cat.	Ceded	GL Hodson		4/1/79	.00	.00	0	.00
203071	Facultative	Ceded	Peterson	Various	Various	.00	.00	0	.00
207095	Facultative	Ceded	Rein. Fac	Various	Various	.00	.00	0	.00
200107	Facultative	Ceded	Intere	Various	Various	.00	.00	0	.00
204138	Facultative	Ceded	JL Kelley	Various	Various	.00	.00	0	.00

200095	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
208138	Facultative	Ceded	JL Kelley	Various	Various	.00	.00	0	.00
200085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
204128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
200141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
202035	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
202071	Facultative	Ceded	Peterson	Various	Various	.00	.00	0	.00
200129	Facultative	Ceded	GL Hodson	Various	Various	.00	.00	0	.00
203128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
200141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
207135	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
202085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
200095	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
202058	Facultative	Ceded	Carpenter	Various	Various	.00	.00	0	.00
200035	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
202128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
200129	Facultative	Ceded	GL Hodson	Various	Various	.00	.00	0	.00
202141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
202085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
200135	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
205133	Facultative	Ceded	TA Greene	Various	Various	.00	.00	0	.00
200095	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
204128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
200058	Facultative	Ceded	Carpenter	Various	Various	.00	.00	0	.00

Contract Number	Description	Ceded Assumed	Broker	Partic.	Eff. Date	Account Receivable	Account Payable	Outstanding Reserves	UPR
203141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
200125	Facultative	Ceded	Intntl. Re	Various	Various	.00	.00	0	.00
204138	Facultative	Ceded	JL Kelley	Various	Various	.00	.00	0	.00
204141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
200085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
204004	Facultative	Ceded	Carpenter	Various	Various	.00	.00	0	.00
200138	Facultative	Ceded	JL Kelley	Various	Various	.00	.00	0	.00
205141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
203085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
000163	4 Mln XS 1 Mln	Ceded	EH Walker	3.00	1/1/78	.00	.00	0	.00
000147	4 Mln XS 1 Mln	Ceded	EH Walker		1/1/76	.00	.00	0	.00
000155	4 Mln XS 1 Mln	Ceded	EH Walker		1/1/77	.00	.00	0	.00
000148	5 Mln XS 5 Mln	Ceded	EH Walker		1/1/76	.00	.00	0	.00
000607	5 Mln XS 5 Mln	Ceded	EH Walker	3.00	1/1/80	.00	.00	0	.00
000113	5 Mln XS 5 Mln	Ceded	EH Walker		1/1/75	.00	.00	0	.00
000600	4 Mln XS 1 Mln	Ceded	EH Walker		1/1/79	.00	.00	0	.00
000156	5 Mln XS 5 Mln	Ceded	EH Walker		1/1/77	.00	.00	0	.00
000160			EH Walker			.00	.00	0	.00
000601	5 Mln XS 5 Mln	Ceded	EH Walker	3.00	1/1/79	.00	.00	0	.00
000112	4 Mln XS 1 Mln	Ceded	EH Walker		1/1/75	.00	.00	0	.00
000164	5 Mln XS 5 Mln	Ceded	EH Walker	3.00	1/1/78	.00	.00	0	.00
000620	5 Mln XS 5 Mln	Ceded	EH Walker	3.00	1/1/81	.00	.00	0	.00
000161						.00	.00	0	.00
Total Mission Insurance Company *						.00	.00	0	.00
Grand Total						.00	.00	0	.00

EXHIBIT 6

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
Date: February 25, 1994
Honorable Kurt J. Lewin, Judge

C 572 724

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, *Plaintiff*

vs.

MISSION INSURANCE COMPANY, *etc.* and Consolidated Cases, *Defendant*

NATURE OF PROCEEDINGS: RULING ON SUBMITTED MATTER ON THE MOTION OF DEFENDANT TO ENFORCE REINSURANCE COMMUTATION AND SETTLEMENT AGREEMENT WITH IMPERIAL CASUALTY AND INDEMNITY COMPANY, AND FOR JUDGMENT PURSUANT TO C.C.P. SECTION 664 AND REQUEST FOR ATTORNEYS' FEES, HERETOFORE ARGUED AND SUBMITTED; THE COURT NOW RULES AS FOLLOWS:

ORDER

The holding of the Supreme Court in *Prudential Reinsurance Co. v. Superior Court (1992) 3 Cal. 4th 1118*, although permitting setoff, strictly limits it to a company to company basis. Notwithstanding the universal recognition that setoff in insolvency proceedings constitutes an unjustified preference, the Court held that setoff was

clearly compelled by the clear language of *Insurance Code § 1031.*

The Court was emphatic, however, that the setoff not be expanded beyond entities which shared mutuality of identity and capacity.

> "We conclude that such an unwarranted expansion of the setoff doctrine would permit an exponential increase in the amount subsidiaries could set off to the detriment of liquidation estates.", *Prudential Reinsurance Co. v. Superior Court, supra, 1137.*

Notwithstanding Imperial's argument to the contrary, the issue was squarely addressed and resolved by the Court as contemplated by the settlement agreement sought to be enforced. There is no basis in law or equity nor under the settlement agreement to apply any tortured analysis to broaden the doctrine of setoff.

Therefore, and for the reasons articulated by this Court at the hearing on these motions, setoff is available only to the extent and between the specific entities as explicitly set out in the subject cession agreements.

A COPY OF THIS MINUTE ORDER IS MAILED THIS DATE BY U.S. MAIL ON BOTH APPEARING SIDES.

[Filed Mar. 8, 1994]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

(Title Omitted in Printing)

ORDER GRANTING INSURANCE COMMISSIONER'S MOTION TO ENFORCE REINSURANCE COMMUTATION AND SETTLEMENT AGREEMENT WITH IMPERIAL CASUALTY AND INDEMNITY COMPANY AND FOR JUDGMENT PURSUANT TO CCP SECTION 664.6 AND REQUEST FOR ATTORNEYS' FEES

The Insurance Commissioner's Motion to Enforce Reinsurance Commutation and Settlement Agreement with Imperial Casualty and Indemnity Company and for Judgment pursuant to Code of Civil Procedure 664.6 and Request for Attorneys' Fees has been duly Noticed and having come before this Court, Department 4, the Hon. Kurt J. Lewin presiding, on November 18, 1993, and the Court having considering the Motion, IT IS HEREBY ORDERED THAT:

The Court has issued its Order dated February 25, 1994, a copy of which is attached hereto as Exhibit A, embodying the reasoning behind the following Order.

The Motion of the Insurance Commissioner to Enforce Reinsurance Commutation and Settlement Agreement with Imperial Casualty and Indemnity Company, and for Judgment pursuant to Code of Civil Procedure, Section 664 and Request for Attorneys' Fees is granted.

DATED: Mar. 8, 1994

/s/ Kurt J. Lewin
THE HONORABLE KURT J. LEWIN
Judge of the Superior Court

[Exhibit A Omitted in Printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-55855

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, MISSION REINSURANCE CORPORATION TRUST, and HOLLAND-AMERICA INSURANCE COMPANY TRUST,
Plaintiff-Appellee,

vs.

ALLSTATE INSURANCE COMPANY,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California

RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

I.

INTRODUCTION

The pending Petition for Rehearing, at nearly every turn, misapprehends the applicable law. The principal argument is that the underlying action to collect money damages on behalf of the Mission Group of Insurance Companies ("Mission") is actually equitable in nature,

because the California Insurance Commissioner, suing as Mission's liquidator ("the Liquidator"), has asserted a claim for declaratory relief in addition to a claim for money damages. The Liquidator's contention that declaratory relief claims are equitable in nature inexplicably ignores three decisions of this Court—dating back more than 50 years—which hold that declaratory relief claims, having their origin in a federal statute, are neither equitable nor legal *per se*. Instead, in determining whether declaratory relief claims are legal or equitable, the court must look to the underlying nature of the dispute. Here, that inquiry could not be simpler, since this action has but one fundamental objective: to recover money damages for the Mission estate. Such actions have been universally recognized as ones at law from times predating *Marbury v. Madison*, and this is precisely the kind of case routinely decided by federal courts sitting in diversity.

The Liquidator also urges rehearing based on a recent letter from Allstate's counsel to the Liquidator's attorneys. If rehearing were granted on this basis, the Court would be establishing a proposition no less novel than this: Rehearing should be granted when the parties' counsel do not agree on the scope or import of a panel's decision. The mere statement of this proposition is its own refutation.

The Liquidator next argues that the panel's decision overlooks recent decisions of the United States Supreme Court and other federal courts. But the authorities cited by the Liquidator range from inconsequential to simply irrelevant. For instance, the Liquidator relies upon a Supreme Court decision, *Tafflin v. Levitt*, 493 U.S. 455, 110 S. Ct. 792 (1990), which we are told affirmed the Fourth Circuit's application of *Burford* abstention in cases at law. The Liquidator ignores the fact that *certiorari* was granted in *Tafflin* limited to the question of whether state courts have concurrent jurisdiction over RICO actions. Thus, the *Burford* abstention doctrine was simply not before the Supreme Court in the *Tafflin* case.

Finally, the Liquidator argues that the panel's decision creates an intra-circuit conflict regarding the appealability of remand orders. Again, the argument is simply wrong. As shown below, there is no inconsistency between the panel's decision and any other published opinion of this Court. For each of the above reasons, discussed in more detail below, the Liquidator's Petition for Rehearing should be denied.

II.

ARGUMENT

A. *The Panel Correctly Characterized This Action As Legal In Nature.*

The Liquidator's principal argument in support of his Petition for Rehearing is that the panel erroneously concluded that this action is legal rather than equitable in nature. Thus, the Liquidator argues, the panel's decision is erroneous even if *Burford* abstention is limited to equitable proceedings.

This argument reflects an about-face by the Liquidator. In his brief on appeal, the Liquidator argued strenuously against limiting the *Burford* abstention doctrine to equitable actions, without even suggesting that the present suit should be viewed as equitable in nature. *See* Appellee's Answering Brief at pages 29-33.[1]

The Liquidator had good reason for not contending that this action is equitable in nature. This contention is flatly rejected by the controlling decisions, including

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[1] The Liquidator's failure to raise this issue earlier is itself a ground for denial of the Petition for Review, since "[p]arties generally may *not* insert *new* issues or arguments for the first time in a petition for rehearing." 2 D. Nelson, C. Goelz & M. Watts, 2 FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE ¶ 11:35 (1995) (emphasis in original; citing *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir.), *cert. denied*, 113 S. Ct. 297 (1992); *Partenweederei, M.S. Belgrano v. Weigel*, 313 F.2d 423, 424-25 (9th Cir. 1962), *cert. denied*, 373 U.S. 904 (1963)).

three decisions of this Court which the Liquidator inexplicably fails to cite.

1. *Declaratory Relief Claims Are Neither Legal Nor Equitable Per Se.*

As the Liquidator concedes in a footnote, "some federal courts have held that declaratory judgment actions, as creatures of statute, are inherently neither legal nor equitable." Petition for Rehearing at page 3, n.3. These "federal courts" include this very Court and, indeed, every other Circuit that has looked at the issue. In fact, it is now settled beyond dispute that declaratory relief claims cannot be classified as either legal or equitable *per se*. As a result, in determining whether a declaratory relief claim is legal or equitable, courts look to "the basic nature of the plaintiffs' case and the manner in which the issues would likely have arisen" in the absence of the Declaratory Judgment Act. *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 493 (1st Cir. 1992). *Accord Wallace v. Norman Industries, Inc.*, 467 F.2d 824, 827 (5th Cir. 1972) ("a declaratory judgment action cannot be termed as either inherently at law or in equity. When classification has been required, courts have examined the basic nature of the issues involved to determine how they would have arisen had Congress not enacted the Declaratory Judgment Act."); *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 824 (2d Cir. 1968) ("A declaratory judgment action is a statutory creation, and by its nature is neither fish nor fowl, neither legal nor equitable. Where, as here, such an action has required classification, the courts have looked to the basic nature of the suit in which the issues involved would have arisen if Congress had not created the Declaratory Judgment Act.")

In *Moretrench American Corp. v. S.J. Groves & Sons Co.*, 839 F.2d 1284 (7th Cir. 1988), Judge Posner, writing for a unanimous court, applied the above principles

in determining whether an action should be deemed equitable so as to allow an interlocutory appeal under the "*Enelow-Ettelson*" doctrine. In language equally applicable here, Judge Posner observed:

> *Moretrench's* suit against [the defendant] GAB is a suit at law; it seeks damages for breach of contract. *The fact that it also seeks a declaratory judgment is irrelevant.*

839 F.2d at 1286 (emphasis added).

Indeed, this Court has followed the above rule for more than 50 years. In 1939, this Court observed that "the nature of an action for declaratory relief is correctly stated in the appellee's brief. It 'is neither legal nor equitable, but *sui generis*.' " *Pacific Indemnity Co. v. McDonald*, 107 F.2d 446, 448 (9th Cir. 1939). This Court most recently reaffirmed this holding in *Transamerica Occidental Life Insurance Co. v. Digregorio*, 811 F.2d 1249 (9th Cir. 1987):

> "Declaratory relief is neither strictly equitable nor legal . . . ." [Citations.] A particular declaratory judgment draws its equitable or legal substance from the nature of the underlying controversy.

811 F.2d at 1251 (quoting E. Borchard, DECLARATORY JUDGMENTS 399 (2d ed. 1941)). *See also Beacon Theatres, Inc. v. Westover*, 252 F.2d 864, 876 (9th Cir. 1958), *rev'd on other grounds*, 359 U.S. 500 (1959) ("Where a typical complaint seeking declaratory relief, and nothing more, is filed . . . the question as to the mode of trial 'should be governed by a determination as to whether the basic nature of the issue is 'legal' or equitable.' ").

Although it seems clear that federal law governs the determination of whether this case is legal or equitable in nature; it is worth noting that—contrary to the Liquidator's contentions—the foregoing principles also find repeated expression in the California decisions. As the

Liquidator observes, some California decisions have suggested, usually in dictum, that declaratory relief actions are equitable in nature. Typically, these decisions make such observations merely to acknowledge the Court's discretion in determining whether to grant declaratory relief or in determining the scope of such relief. *See, e.g., Munson v. Linnick,* 255 Cal.App.2d 589, 595, 63 Cal. Rptr. 340 (1967) (trial court had discretion, in granting declaratory judgment respecting the validity of a prior lawsuit, to award damages "under a malicious prosecution theory, as an incident to the declaratory relief sought").[2]

However, more than 50 years ago, the California Supreme Court recognized—consistent with the federal authorities discussed above—that "declaratory relief is not strictly legal or equitable, but is *sui generis* in nature." *Moss v. Moss,* 20 Cal.2d 640, 128 P.2d 526 (1942). And in a decision rendered only a few months earlier, the California Supreme Court had observed:

> [T]he remedy [of declaratory relief] has been stated to be *sui generis* rather than strictly legal or equitable. [Citation] Thus, it has been suggested that where it becomes important under constitutional provisions to classify a particular action for declaratory relief as legal or equitable, the determination should depend upon the issues involved in the particular action.

Gore v. Bingaman, 20 Cal.2d 118, 120, 124 P.2d 17 (1942). A string of more recent Court of Appeal decisions has recognized the continuing vitality of these holdings. *See, e.g., Strauss v. Summerhays,* 157 Cal.App.3d 806, 811, 204 Cal.Rptr. 227, 230 (1984) ("in order to determine whether an action for declaratory relief is equitable or legal, we must look behind the declaratory

[2] On the merits of this issue, *Munson* was later overruled. *See Babb v. Superior Court,* 3 Cal.3d 841, 850, 92 Cal.Rptr. 179, 184 (1971).

relief label to the gist of the action"); *Escamilla v. California Ins. Guarantee Ass'n,* 150 Cal.3d 53, 57, 197 Cal.Rptr. 463, 465 (1983) ("whether a jury trial is required, in essence, depends upon the nature of issues as equitable or legal. . . . The fact that the initial action . . . sought declaratory relief, of itself, was not determinative of the issues as either legal or equitable").

2. *This Action Is Legal, Rather Than Equitable, In Nature.*

There can be no doubt as to the application of the foregoing rule in the present case. This is an action to recover money, pure and simple. The underlying nature of this action is indisputably legal rather than equitable. As in the *Moretrench* case, this action "is a suit at law; it seeks damages for breach of contract. The fact that it also seeks a declaratory judgment is irrelevant." 839 F.2d at 1286.

The Liquidator argues, however, that "the underlying State Court insolvency proceedings . . . are inherently equitable in nature." Petition for Rehearing at 4. Even were this true, the underlying *lawsuit by the Liquidator against Allstate*—which, after all, is separate and apart from the liquidation proceedings themselves—is an action at law, not a special proceeding. Indeed, one of the decisions relied on by the Liquidator establishes this very fact. In *Kinder v. Superior Court,* 78 Cal.App.3d 574, 144 Cal.Rptr. 291 (1978), the Insurance Commissioner sought to invoke a summary "show cause" procedure, within the liquidation proceeding itself, to enforce a debt allegedly owed by an insurance agent to an insolvent insurer. The Superior Court refused to employ such a procedure, and the Court of Appeal affirmed, ruling that a separate action at law had to be filed to pursue balances due the insolvent insurer. The Court held:

> The summary process would deprive [defendant] of important rights to which it would be entitled in an independent action. Among them are the right to a

> jury trial and, in a trial without a jury, the right to findings of fact and conclusions of law. A jury trial cannot be demanded as a matter of right in a special proceeding unless it is expressly made available by statute. [Citation] The liquidation statute makes no provision for a jury trial in a proceeding had thereunder. . . . Nor are findings required in a special proceeding unless the statute so provides. [Citation] Proceedings under the liquidation provisions of the Insurance Code are special proceedings and findings are not required.

78 Cal.App.3d at 580-81.[3]

Finally, the Liquidator argues that "Allstate's admitted primary defense of setoff is, in and of itself, a form of equitable relief and would be determined as part of the declaratory relief action." Petition for Rehearing at 4. Again, the Liquidator is simply wrong. In support of his argument, the Liquidator relies solely upon *Prudential Reinsurance Co. v. Superior Court*, 3 Cal.4th 1118, 14 Cal.Rptr.2d 749 (1992), a decision that actually undermines the Liquidator's contention. In that case, the California Supreme Court recognized that the right of set-

[3] The Court's reference to the right to trial by jury establishes that it was referring to an "independent action" at law rather than in equity, since in California there is no right to jury trial in equitable proceedings. *See, e.g., Escamilla v. California Ins. Guarantee Ass'n, supra*, 150 Cal.App.3d 53 at 57, 197 Cal.Rptr. 463 at 465.

The Liquidator's Petition for Rehearing also cites *Morgan Stanley Mortgage Capital, Inc. v. Insurance Commissioner*, 18 F.3d 790, 794 (9th Cir. 1994), and *Garamendi v. Executive Life Ins. Co.*, 17 Cal.App.4th 504, 21 Cal.Rptr.2d 578 (1993), for the proposition that the "underlying state court insolvency proceedings . . . are inherently equitable in nature." For the reasons seen above, this observation is irrelevant, because the pertinent inquiry is whether the underlying *lawsuit* is equitable in nature, not whether the state court liquidation proceedings are legal or equitable. In any event, neither of the cited decisions discusses the proposition for which they are cited by the Liquidator.

off asserted by the reinsurer defendants was a creature of statute, not of equity. In fact, the Court expressly rejected the Commissioner's appeal to "equitable" grounds for disallowing the statutory right of offset:

> We do not perceive the issue to be one of . . . judicial favoritism of one group of claimants over another on supposed "equitable" grounds, having nothing to do with the historic concerns of equity jurisprudence in this area. Instead, the issue is one calling for construction of a comprehensive, broadly-phrased *statute* permitting set-off and admitting no exception for reinsurance relationships.

3 Cal.4th at 1142 (emphasis added).

For the reasons discussed above, the panel correctly ruled that this action is legal rather than equitable in nature, and there is no reason to order rehearing.

B. *Correspondence From Allstate's Counsel Affords No Basis for Rehearing.*

The Liquidator next argues that Allstate is attempting "to interfere with the [state] liquidation proceeding based entirely upon the Decision" in this case. Petition for Rehearing at 5. The sole basis for this remarkable contention is a letter sent by Allstate's counsel on February 9, 1995 to counsel for the Liquidator. Even assuming that the Liquidator's reliance on matters outside the record is permissible,[4] this letter hardly affords grounds for reconsideration of the panel's decision.

To begin with, the letter in question hardly "interferes" with the Mission insolvency proceedings. Indeed, it is hard to see how a letter from a party's counsel could

[4] As this Court has held, "[c]onsideration of subsequent factual occurrences is, thus, beyond the scope of a petition for rehearing." *Armster v. United States District Court*, 806 F.2d 1347, 1356-57 (9th Cir. 1986).

ever constitute the kind of interference with state administrative proceedings that is required to raise *Burford* concerns. Simply put, at most the Liquidator has shown that his counsel and Allstate's attorneys disagree regarding the scope of the panel's decision. If rehearing were required on this ground alone, there could scarcely ever be a final decision of this Court.

In any event, counsel's letter does not stake out the purportedly strident positions attributed by the Liquidator to Allstate. The letter merely adopts the non-controversial position that, in light of the panel's decision, the Liquidator's claims against Allstate and Allstate's defenses to those claims are now pending in federal court and not before the Los Angeles Superior Court. The Liquidator apparently contends otherwise, suggesting that the Superior Court will issue a declaration regarding Allstate's right of set-off as an incident to the insolvency proceedings. Petition for Rehearing at 7. Once again, the Liquidator could not be more off the mark.[5] But the important point for present purposes is that the remote possibility of a dispute in the future over this issue affords no basis for reconsidering the panel's decision now.

C. *Recent Decisions Have Not Undermined The Panel's Opinion.*

The Liquidator also argues that the panel's decision overlooks recent decisions from the United States Supreme Court and other Circuit Courts establshing that *Burford* abstention is not limited to equitable proceedings. Once again, the Liquidator is simply wrong.

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[5] Any such attempt by the California courts to summarily adjudicate Allstate's right of set-off would be exactly the kind of action prohibited by the *Kinder* decision. See discussion at page 7 above. There is no reason to believe that the Superior Court shares the Liquidator's mistaken belief that such a summary proceeding should be employed.

First, the Liquidator relies on two Supreme Court decisions: *Ankenbrandt v. Richards,* —— U.S. ——, 112 S. Ct. 2206 (1992), and *Tafflin v. Levitt,* 493 U.S. 455, 110 S. Ct. 792 (1990). The Liquidator argues that, in *Ankenbrandt,* "the Supreme Court had the opportunity to reach the result reached by this Court's Decision, but significantly did not and left the door open for *Burford* abstention in actions law." Petition for Rehearing at 11. In fact, *Ankenbrandt* supports the panel's decision in the present case. There, the Supreme Court held that the domestic relations exception to federal jurisdiction—which "divests the federal courts of power to issue divorce, alimony, and child custody decrees"—had no application in a lawsuit which "in no way seeks to such a decree" but merely seeks to recover monetary damages for alleged child abuse. 112 S. Ct. at 2215. The Court's brief discussion of *Burford* abstention, which comprises a single paragraph of the opinion, tracks the same analysis. The Court concluded that *Burford* abstention was inappropriate because "the status of the domestic relationship" between the parties "has no bearing on the underlying torts alleged." *Id.* at 2216. In other words, the Court reasoned that an action merely to recover money damages threatened no interference with state proceedings to determine such matters as child custody or domestic relations. This observation, of course, is fully consistent with the panel's holding that *Burford* abstention is inappropriate in actions at law for money damages.

Tafflin v. Levitt is even more off the mark. The Liquidator argues that "the Supreme Court affirmed a Fourth Circuit decision which upheld Burford abstention in a RICO action for money damages." Petition for Rehearing at 11. The Liquidator overlooks the fact that the Supreme Court's grant of *certiorari* in *Tafflin* was expressly "limited to the question whether state courts have concurrent jurisdiction over civil RICO claims." 493 U.S. at 458, 110 S. Ct. at 794. Thus, the Supreme Court simply did not address the abstention issue.

The Liquidator next argues that the panel inappropriately relied on a Third Circuit decision, *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265 (3rd Cir. 1991). The Liquidator cites two later Third Circuit decisions, *Riley v. Simmons*, F.3d ——, 1995 WL 19638 (3rd Cir. Jan. 20, 1995), and *General Glass Indus. Corp. v. Monsour Medical Foundation*, 973 F.2d 197 (3rd Cir. 1992). It is true that the panel in *General Glass* ruled, inconsistently with *University of Maryland*, that *Burford* abstention may apply in legal proceedings. But as both the author of the *Riley v. Simmons* decision and a concurring judge noted, under Internal Operating Procedure 9.1 of the Third Circuit, one panel of that court may not overrule another and " 'to the extent that the decision of a later panel conflicts with existing circuit precedent, we are bound by the earlier, not the later decision.' " *Riley v. Simmons*, 1995 WL 19638 at 16 (Nygaard, J., concurring; quoting *United States v. Monaco*, 23 F.3d 793, 803 (3rd Cir. 1994)); *see also id.* at 9 n. 7 (opinion of the court) ("this panel is bound by the earlier holdings of this Court under Internal Operating Procedure 9.1").[6] Thus, *University of Maryland* remains the law in the Third Circuit, establishing that the *Burford* abstention doctrine is inapplicable to purely legal proceedings.

The Liquidator also contends that a recently-decided Second Circuit decision "suggests that the Court's application of *Burford* abstention is not limited to cases where a federal court is sitting in equity." Petition for Rehearing at 13. However, the cited decision—*Sheerbonnett, Ltd. v. American Express Bank, Ltd.*, 17 F.3d 46 (2d Cir. 1994)—suggests nothing of the kind. *Sheerbonnett* did not discuss the question of whether actions of law may be suitable vehicles for *Burford* abstention. The court rejected *Burford* abstention on different grounds, namely that exercising jurisdiction over a damages suit would have no impact on pending state court liquidation proceedings to which the defendant was not even a party. 17 F.3d at 49. While the Second Circuit might alternatively have rejected *Burford* abstention on the basis that the lawsuit before it sought only money damages, the reliance on other grounds hardly demonstrates a conflict with the panel's decision in this case.[7]

Finally, the Liquidator repeats his earlier argument that "*Burford* abstention is routinely exercised in insurance insolvency cases." Petition for Rehearing at 8. This may have been true prior to the Supreme Court's ruling in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 109 S. Ct. 2506 (1989). But as the panel observed, this proposition is far from true now that the Supreme Court has made clear that *Burford* abstention does not apply in actions at law for money damages. Such actions—unlike proceedings in equity in which a federal court stands in judgment over state administrative rulings or proceedings—simply do not present any risk that the federal court will interfere in a

[6] As Judge Nygaard observed, there are two additional flaws in the *General Glass* decision. For one, *General Glass* "did not cite or discuss the clear holding of *Baltimore Bank* [*for Cooperatives v. Farmers Cheese Cooperative*, 583 F.2d 104, 111 (3rd Cir. 1978)] that forbids abstention when money damages are sought." 1995 WL 19638 at 15. Second, as Judge Nygaard noted, the *General Glass* decision relied on *Tafflin v. Levitt*, ignoring—as the Liquidator does here—the fact that "the Court's grant of *certiorari* in that case was limited solely to whether state courts have concurrent jurisdiction over RICO claims." 1995 WL 19638. As Judge Nygaard concluded, "*Tafflin* therefore had no precedential value on the issue before the *General Glass* panel." *Id.*

[7] The Liquidator also complains that the panel relied on a 1993 First Circuit decision, *Fragoso v. Lopez*, 991 F.2d 878, holding that *Burford* abstention is appropriate only in equitable proceedings, while failing "to mention or address the First Circuit's earlier conflicting decision in *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991)." Petition for Rehearing at 13. The "opinion" in *Gonzalez*, however, is actually a one-paragraph per curiam order granting an unopposed motion to dismiss. This brief order, moreover, does not even discuss the application of *Burford* abstention to actions at law.

matter of state concern. For precisely this reason, as the panel observed, both the First and Third Circuits have rejected *Burford* abstention in such collection actions.[8]

D. *The Panel's Ruling On Appealability Of The Remand Order Here Does Not Create An Intra-Circuit Conflict.*

The Liquidator's final ground for urging rehearing is a purported conflict between the panel's decision and the Court's earlier decision in *Bennett v. Liberty National Fire Ins. Co.*, 968 F.2d 969 (9th Cir. 1992). The Liquidator's argument is difficult to fathom. The Liquidator seems to be contending that, inconsistent with the panel's ruling, the *Bennett* decision does not permit an appeal from an order of remand based on *Burford* abstention grounds. For good reason, the Liquidator makes this argument only gingerly, stating only that "[t]he reasoning of *Bennett* suggests that the application of abstention, in and of itself, does not constitute a collateral disputed question." Petition for Rehearing a 14.

There is no reason to believe that the panel overlooked the *Bennett* decision, since Allstate brought the decision to the panel's attention pursuant to Rule 28(j), Fed.R.App. P., by letter dated July 22, 1992 and the Liquidator proceeded, in a letter dated August 13, 1992, to discuss the *Bennett* decision at some length.[9] Nor is there in fact any inconsistency between the ruling in *Bennett* and the panel decision in the present case. *Bennett* authorized an

[8] *See* panel opinion at 1432 (citing, *inter alia*, *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993) and *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265 (3rd Cir. 1991).) *See also Kenworthy v. Hargrove*, 826 F.Supp. 138, 141 (E.D. Pa. 1993) ("*Burford* abstention is limited to federal courts sitting in equity.")

[9] Thereafter, on August 14, 1992, Allstate wrote the 9th Circuit clerk, objecting to the Liquidator's presentation of argument regarding the *Bennett* decision "although Rule 28(j), Fed.R.App.P., expressly prohibits any 'argument' regarding the authorities of which the Court is being advised."

appeal from a remand order on abstention grounds "because the Court's abstention-based remand decided the merits of appellant's arbitration claim." 968 F.2d at 970. *Bennett* did not hold that, in the absence of the ruling on arbitrability, a remand order would have been reviewable only by mandamus. *See id.*

The Liquidator worries that "if the Decision stands, then all district court decisions that remand on grounds of abstention without determination of any substantive issue on the merits are automatically appealable." Petition for Rehearing at 15. Perhaps so, but this will hardly open the floodgates to appellate jurisdiction. After all, the usual order in the case of *Burford* abstention is to dismiss the action; remand is appropriate only when the action got to the Federal Court by way of removal.[10] Indeed, the fact that *Burford* abstention orders typically result in dismissals which are immediately reviewable on appeal is a compelling ground for allowing appeal of remand orders based on *Burford* abstention, which just as effectively reflect a final determination of federal court proceedings.

III.

CONCLUSION

The Liquidator's Petition for Rehearing reflects a series of fundamental errors regarding the governing law. The principal contention advanced by the Liquidator—that this action is equitable in nature—ignores controlling precedents from this very Court and the California Supreme Court. Nor should this case become the first in judicial history to order rehearing based on a post-decision letter from one party's attorney to the other's, lest the Court establish the extraordinary rule that rehearing should be

[10] *See generally* E. Chemerinsky, FEDERAL JURISDICTION § 12.3 at 612 (1989) (*Burford* abstention "requires the Federal Court to dismiss the case"). This issue was discussed further in Allstate's January 21, 1992 brief in opposition to the Liquidator's motion to dismiss this appeal at pages 14-15.

granted to address the parties' conflicting, subjective views as to the scope of a reported decision. The remaining grounds advanced by the Liquidator are equally without merit, and the Liquidator's Petition for Rehearing should accordingly be denied.

DATED: March 19, 1995

Respectfully submitted,

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